Supreme Court
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No. 04 161

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IN The

Supreme Court of the United States

October Term, 2003

DJ MANUFACTURING CORPORATION,

Petitioner,

v.

TEX-SHIELD, INC., XYZ INSURANCE CO., CREATIVE APPAREL, BLUCHER USA, BLUCHER GMBH.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Where a sole source New Jersey supplier, under the ultimate control of a foreign (i.e., German) corporation, in a U. S. Department of Defense procurement favors a U. S. Mainland offeror over a Puerto Rican manufacturer of chemical and biological protective wear by offering (and selling) its sole-source, patented product at a substantially lower price to the Mainland manufacturer, while at the same time and on the same procurement offering the same product to the Puerto Rican offeror at a substantially higher price; is such price discrimination not unlawful under 10 Laws of Puerto Rico ("L.P.R.") §264 entitled "Sales in Puerto Rico at prices different than from those at which articles sold elsewhere," which provides, in pertinent part, that:

> It shall be unlawful to sell, contract to sell, offer to sell … articles in Puerto Rico … at prices which are substantially different from prices charged or quoted by such seller for goods …to buyers located outside of Puerto when such difference in price is granted with the purpose of destroying competition or eliminating a competitor in Puerto Rico.

(emphasis added)?

Is not the lower court's ruling, that the difference in prices under the statute refers only to a supplier offering its product in Puerto Rico at a substantially lower price, to the exclusion of prejudicial over-pricing, in conflict with established rulings of this Court that where a statute presents no ambiguity and leads to no absurd or odd result, there is no room for construction, and, therefore, represents plain error, warranting this Court's corrective action, especially where the

prejudicial pricing interfered with Federally-mandated "full and open" competition in Federal procurements?

As an alternative to acting on this Petition for Certiorari, should the Court certify the question of interpretation of 10 L.P.R. §264 to the Supreme Court of Puerto Rico, inasmuch as (1) both parties at different times have suggested that the lower court do so, and (2) protection of its citizens, and particularly small businesses such as the Petitioner, is the announced intent of the Puerto Rico Legislature in enacting its own antitrust laws, and the construction of 10 L.P.R. §264 is one of first impression?

LIST OF PARTIES

The names of the parties to this proceeding, which this Court is requested to review are: (1) DJ Manufacturing Corporation (DJM), a Puerto Rico Corporation, plaintiff, appellant and petitioner here; (2) Tex-Shield, Inc., a Delaware Corporation, defendant, appellee and respondent (Tex-Shield, Inc. is wholly-owned by Blucher USA, which in turn is wholly-owned by Blucher GmbH, a German Corporation). [1]

[1] When the District Court dismissed the underlying action (page 25a of Appendix), it dismissed all counts and all defendants, and an appeal was taken only to the dismissal of Tex-Shield, Inc. and only to the count relating to 10 L.P.R §264, entitled "Sales in Puerto Rico at prices different from at which articles are sold elsewhere." Consequently, review is sought only to that portion of the judgment as it relates to Tex-Shield, Inc. and 10 L.P.R. §264.

TABLE OF CONTENTS

Page

Questions Presented for Review..... i

List of Parties..... iii

Table of Contents..... iv

Table of Citations..... v

Opinions Below..... 1

Statement of Jurisdiction..... 1

Statement of Case..... 2

Reasons for Granting the Writ..... 5

Conclusion..... 15

TABLE OF CITATIONS

Cases Cited:

	Page
BFP v. Resolution Trust Corp., 511 U.S. 531, 537-38, 128 L.ed 2nd 556 (1994)	**10**
Caminetti v. U.S., 242 U.S. 470, 490(1917)	**8**
Chicago v. Environmental Defense Fund, 511 U.S. 328, 337, 128 L. Ed 302, 311 (1994)	**9**
Elkins v. Moreno, 435 U.S. 647, 662 n. 16 (1978)	**14**
F.T.C. v. Morton Salt, 334 U.S. 37, 50 (1948)	**12**
Dept. of Housing and Urban Dev. v. Rucker, 535 U.S. 125, 122 S. Ct. 1230, 52 L. Ed 158 (2002)	**7**
Palmer v. Hoffman, 318 U.S. 109, 118 (1943)	**13**
Proper v. Clark, 337 U.S. 472, 489 (1949)	**13**
Suarez & Co., Inc. v. Dow Brands, Inc. 337 F.3d 1, 8 (1st Cir 2003)	**10**
The Tungus v. Skovgaard, 358 U.S. 588, 596 (1959)	**13**

Contents

Table of Citations (Cont'd)

U.S. v. Durham Lumber Co., 363 US 522, 526-7 (1960)..... 13

U.S. v. Gonzalez, 520 U.S. 1 (1997)..... 8

U.S. v. Wiltberger, 5 Wheat 73, 5 L. Ed 37, 42 (1820)..... 7

Other Authorities:

Estrella Arturo, "Anti-Trust Law In Puerto Rico," 28 Revista del Colegio de Abogados de Puerto Rico 505, 624-25 (1968)..... 11

Von Kalinowski on Antitrust 2nd Ed Vol. 7 Chapter 153 at page 153-10..... 12

Contents

APPENDIX

Page

Appendix A – Order on Petition For Rehearing By Court of Appeals For The First Circuit, Entered October 20, 2003..... 1a

Appendix B – Copy of Docket, Court of Appeals For The First Circuit..... 3a

Appendix C– Decision By The United States Court of Appeals For The First Circuit on Petition For Rehearing, dated October 20, 2003..... 6a

Appendix D – Decision By The United States Court of Appeals For the First Circuit, dated July 28, 2003 (withdrawn)..... 18a

Appendix E – Opinion and Order by the United States District Court for the District of Puerto Rico, dated June 28, 2002..... 31a

Appendix F – Award Of Arbitrator, dated January 20, 1999 in DJ Manufacturing Corporation v. Tex-Shield, Inc., American Arbitration Association, No. 13 130 00470 98..... 69a

Appendix G – The Anti-Monopoly Act of 1964: February 20, 1964 Hearing on S. 594

Appendix (Cont'd)

& H. 909 before Senate Civil Juridical Committee, House Committee on Commerce & Industries & House Committee; Testimony of Hiram Cancio (Certified English translation, from Appellee's Appendix submitted to the Court of Appeals, pages 26-27)..... 76a

OPINIONS IN THE COURTS BELOW

1) D.J. Manufacturing Corp. v. Tex-Shield, Inc., 347 F. 3d 337 (1st Cir. 2003, decided October 20, 2003, affirming U.S. District Court, District of Puerto Rico). Petitioner's Appendix at page 6a.

2) D.J. Manufacturing Corp. v. Tex-Shield, Inc., published in advance sheet at 337 F. 3d 56 (1st Cir. 2003, decided on July 28, 2003, reversing and remanding, U. S. District Court, District of Puerto Rico). Even though that decision was withdrawn, it is included in Petitioner's Appendix at page 18a.

3) D.J. Manufacturing Corp. v. Tex-Shield, Inc., 275 F. Supp. 2d. 109, 2002 U.S. Dist. LEXIS 25329 (D.P.R., 2002), initially reversed and remanded (see Petitioner's Appendix at page 18a), at 337 F.3d 56 (1st Cir. 2003), but affirmed in a subsequent decision on October 20, 2003, at 347 F. 3d 337 (1st Cir. 2003). Petitioner's Appendix at page 31a.

STATEMENT OF JURISDICTION

The Opinion of the Court of Appeals from which relief is sought, 347 Fed. 3d 337, was entered October 20, 2003. A timely Petition for Rehearing with Suggestion for Rehearing en banc was filed by DJM on October 31, 2003, which Petition was denied November 19, 2003. See Petitioner's Appendix at Page 1a, 3a.

This Court has jurisdiction pursuant to 28 USC 1254(1).

STATEMENT OF THE CASE

The Complaint filed by D.J. Manufacturing Corporation ("DJM") in the District Court of Puerto Rico against Tex-Shield, Inc. ("TSI") among others, charged TSI with discriminating against DJM on U.S. Department of Defense procurements over a period of several years, by offering required goods, specifically Saratoga Filter Cloth, to DJM at a substantially higher price than it was offering and selling the same goods to DJM's mainland competitor. TSI was (and is) the sole source of the goods in question, i.e., the goods could (and can) only be purchased in the U.S. from TSI.

TSI manufactures, sells and is the sole domestic source for a patented product, Saratoga Filter Cloth, which the Department of Defense (DOD) requires for use in the manufacture all of its biological and chemical protective clothing and equipage. TSI, a Delaware corporation, is wholly-owned by Blucher USA, which in turn is wholly-owned by Blucher GmbH, a German Corporation. Blucher GmbH holds the patent for Saratoga Filter Cloth; this cloth is the active component in DOD chemical and biological protective clothing. Anyone wishing to compete for a DOD contract for chemical protective clothing must use Saratoga Filter Cloth, which it must purchase from TSI.

TSI, in addition to being the sole source supplier for Saratoga Filter Cloth, also engages in the manufacture and sale

of finished chemical protective suits. [2] As such, it is at least a potential competitor of DJM.

The price discrimination complained of in the Complaint was so substantial that it enabled the favored mainland cut, make and trim contractor to win an award on a multi-million dollar, competitively-bid DOD contract. Had DJM been offered the same goods at the same price as its Mainland competitor, it would have received the contract award.

Because of price discrimination, DJM's Complaint charged TSI et.al. with violating a Puerto Rico Antitrust Statute, 10 L.P.R. §264, entitled, "Sales in Puerto Rico at prices different from those at which the articles are sold elsewhere." That provision reads, in full, as follows:

> It shall be unlawful to sell, contract to sell, offer to sell, or participate in any step for the sale of articles in Puerto Rico, after making due allowance for differences in costs incident to the delivering of goods in Puerto Rico and the costs of handling such goods in Puerto Rico, at prices which are substantially different from the prices charged or quoted by such sellers for goods of the same grade or quality to buyers located outside of Puerto Rico, when such difference in price is granted with the purpose of destroying competition or eliminating a competitor located in Puerto Rico.

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[2] The facts in the Petition are gleaned from lower court opinions. TSI's manufacturing and selling of finished chemical suits does not appear in those opinions; nevertheless this fact was uncovered in an ancillary proceeding and was before the lower courts. See, e.g., Petitioner's Appendix at page 9a.

No Answer to DJM's Complaint was ever filed by any of the defendants. TSI filed only a Motion to Dismiss. On that Motion, the District Court dismissed, with prejudice, DJM's Complaint, in toto, for failure to state a cause of action against any defendant. See, DJ Manufacturing Corporation v. Tex-Shield, Inc., 275 F. Supp 2d 109, 125-26 (D.P.R. 2002).

In so doing, the District Court, having both 10 L.PR. §264 and snippets of its legislative history before it, concluded that §264 was modeled exclusively after the Federal Anti-Dumping Act of 1916, 15 U.S.C. §72, despite the obvious use of dissimilar language, and, therefore, did not target the situation here, where a Puerto Rican company was quoted a substantially higher price than a state-side competitor for the same article. See 275 F. Supp. 2d at page 125.

DJM appealed, but only as to the TSI and only as to the counts relating to 10 L.P.R. §264, waiving all other possible errors. The Court of Appeals, which had before it the same snippets of legislative history that were before the District Court, found that 10 L.P.R. §264 targeted both discriminatory higher (Robinson Patman type) and lower (anti-dumping type) pricing, as DJM had argued from the start; that such a construction of §264 was based on the plain ordinary language found in the statute, and that language did not lead to an absurd or odd result.

Nevertheless, the Court of Appeals, upon TSI's later Petition For Rehearing, vacated its decision. It then concluded from the legislative history of 10 L.P.R. §264 that, despite the use of the word "different" four times in §264, the Puerto Rico legislature really meant the word "different" to exclude discriminatory high pricing, and to include only unreasonably low pricing. In doing so, the Court below overlooked the fact that in 10 L.P.R. §263(f), [3] the section immediately preceding §264, the legislature used the term "at unreasonably low prices" when it meant to target only unreasonably low prices (to the exclusion of unreasonably high prices).

Additionally, the courts below reached their decisions by misreading what, at best, is ambiguous and limited legislative history, and by ignoring professorial comment made subsequent to the enactment of 10 L.P.R. §264, which comment, in civil law jurisdictions such as Puerto Rico, is given considerable weight. That professorial comment, including comment from one of the drafters of §264 in particular, proclaims that §264 embraces both higher and lower anti-competitive pricing.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE COURT BELOW HAS SO FAR DEVIATED FROM AND CONFLICTED WITH THIS COURT'S DECISIONS, RENDERED OVER TWO

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[3] 10 L.P.R. §263(f) in full reads as follows: "It shall be unlawful to sell or execute any contract for the sale of goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." The legislature obviously knew the difference between the meanings of "low" prices and "different" prices and gave fair warning to all that the offering of goods at substantially higher prices was illegal, by using the word "different."

CENTURIES, CONCERNING STATUTORY CONSTRUCTION, AS TO CALL FOR THIS COURT'S INTERVENTION IN EXERCISE OF ITS POWERS OF SUPERVISION

(A) No Ordinary Case.

This is no ordinary statutory construction, diversity case; nor is it an ordinary anti-trust case. First, it impacts on the integrity of the competitive U. S. Government procurement system. Were the lower court's decision to stand, a foreign corporation, whose national interests may or may not coincide with those of the United States, can dictate by price manipulation who and who does not receive a U. S. Government chemical suit contract. Secondly, the lower court's precedent impacts on the public fisc. Had DJM been offered the same pricing as its stateside competitor, the contract cost to the Government would have been significantly less.

Thirdly, the precedent set by the lower court impacts severely and adversely on the Puerto Rican economy. According to the New York Times Almanac, the Puerto Rican economy is burdened by a very high (12%) unemployment rate and endures a very low yearly per capita income of only $9,800 – significantly lower than any of the 50 states, Guam and the Virgin Islands.

(B) In conflict with almost two centuries of Supreme Court decisions.

As early as 1820, reaching back in history, Mr. Chief Justice Marshall wrote:

> The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction.
>
> The case must be a strong one indeed which would justify a court in departing from the plain meaning of words especially in a penal act, in search of an intention which the words themselves did not suggest.

U.S. v. Wiltberger, 5 Wheat 73, 5 L. Ed 37, 42 (1820). [4]

In an unbroken line of cases reaching into the twenty-first century, the Supreme Court has steadfastly ruled that legislative intent must be drawn from the plain ordinary language of a statute, unless crediting such language results in an odd or absurd result.[5]

Most recently in the case of Department of Housing And Urban Development v. Rucker, 535 U.S. 125 122 S. Ct. 1230, 52 L. Ed 2d 158 (2002), the Court was presented with an issue as to the meaning of the expansive word "any" in a statute and regulation requiring HUD to include in its leases a provision "that the tenant, any member of the household, a

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[4] The underlying action in this petition is a civil action, however 10 L.P.R. §264 is a penal statute.

[5] For an extensive review of U. S. Supreme Court decisions on the subject, see, Norfolk Dredging Company, Inc. v. The United States, 58 Fed. C1.167, 173-77 (2003).

guest, or another person under the tenant's control shall not engage in . . .[a]ny drug related criminal activity at or near the premises[s]" under penalty of eviction." A tenant whose household members were found using drugs challenged the eviction proceeding on grounds that she was innocent and had no knowledge of the drug use. The lower court, straining to find an ambiguity, searched the legislative history and erroneously concluded that the term "any," if given its literal meaning, could not have been the congressional intent. In reversing and remanding, the Supreme Court found resorting to legislative history improper where the statutory text is "unambiguous" and does not lead to "absurd" result. 535 U.S. at 132-133. To the same effect, see U.S. v. Gonzalez, 520 U.S. 1, 6 (1997).

Perhaps most easily understood and most frequently cited is the case of Caminetti v. U.S., 242 U.S. 470, 490 (1917). Therein, the Court reiterated the principle that statutes must be read as written, and that it is from the words used that legislative interest is gleaned. The Court stated:

> W]hen words are free from doubt they must be taken as the final expression of legislative intent . . . the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent.

(emphasis added).

Here, the lower courts failed to take the words used by the Puerto Rico legislature as final. The words "prices which are substantially different" are plain and unambiguous. The Appeals Court found them to be so in its July 28, 2003 decision, subsequently withdrawn (Petitioner's Appendix page

25a). Indeed, it found this still to be the case in its October 20, 2003 decision, review of which is sought. Even there the Court of Appeals stated:

> We begin by noting that the different price language does not appear ambiguous when considered in isolation . . . .[T]he [Puerto Rico] legislature chose the broader term "substantially different" which could cover both higher and lower pricing . . . .

347 F. 3d at 340 (Petitioner's Appendix, page 12a).

Clearly, in this setting it was error to delve further into the legislative intent, since the language used is unmistakably clear and leads to no absurd result. Further, the words used were the final words which found their way into the statute that was read, voted on and signed by the governor, irrespective of what happened before the vote and the governor's signature.

For the sake of argument, however, even if a committee report could be read to suggest that "different" meant only "less," that report would not be the final expression of legislative intent. As Caminetti, supra, teaches, it is the unambiguous words which are the final expression of intent.

Directly on point is Chicago v. Environmental Defense Fund, 511 U.S. 328, 337, 128 L. Ed 302, 311 (1994). Therein this Court stated:

> But it is the statute, and not the Committee Report, which is the authoritative expression of the law, and the statute prominently omits reference to generation. As the Court of Appeals

> cogently put it: "Why should we, then, rely upon a single word in a committee report that did not result in legislation? Simply put we shouldn't."

In the instant case the legislature could easily have limited the reach of 10 L.P.R. §264 to "low" pricing. After all it used a term meaning exactly that in 10 L.P.R. §263(f). In this connection, this Court, again in BFP v. Resolution Trust Corp., 511 U.S. 531, 537-38, 128 L. Ed. 2nd 556 (1994), relying on Chicago v Environment Trust, supra, stated:

> . . .Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.

Without doubt the Puerto Rico legislature should be entitled to this same presumption.

(C) In conflict with the observations of commentators.

As the lower court has recognized:

> Puerto Rico is a civil law jurisdiction and follows the rule of such jurisdictions of heavier reliance on learned commentators than common law jurisdictions. See J. H. Merryman, THE CIVIL LAW TRADITION – 56-57 (2d ed. 1985) ('The civil law is a law of Professors . . . the common law is still a law of the judges').

Suarez & Co., Inc. v. Dow Brands, Inc. 337 F.3d 1, 8 (1st Cir 2003).

With this in mind, the writing of Dr. Arturo Estrella [6] in his law review article "Antitrust Law In Puerto Rico," 28 Revista del Colegio de Abogados de Puerto Rico 505, 624-25 (1968) is significant. First, directing his attention to 10 L.P.R. §264[7] he writes, "its main purpose" (emphasis added) was to protect against dumping. Obviously, in his mind, and to anyone else reading 10 L.P.R. §264, it had at least one other purpose. He then goes on to say, "the phrase 'substantially different' was used with the intention of outlawing lower prices." Again this comment, when read in context, does not rule out proscribing discriminatory higher prices. Neither of these quotes rejects the plain meaning of 10 L.P.R. §264 which outlaws lower and higher prices. Dr. Estrella makes this clear in a subsequent passage, wherein he flatly states that 10 L.P.R. §264 was also designed to target Robinson-Patman Act type, geographic price discrimination. He writes, still directing himself to 10 L.P.R. §264:

> This local provision may be of value as a complement to applicable Federal statutes, such as the Anti-Dumping law and the prohibition against geographic price discrimination under Sections 2(a) and 3 of the Robinson-Patman Act, ...

ibid at page 625 (emphasis supplied).

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[6] Estrella also testified before the legislature. His article reviews the legislation after its passage wherein the legislature let stand the term "substantially different," obviously choosing not to limit 10 L.P.R. §264 to only lower pricing in Puerto Rico.

[7] 10 L. P.R. §264 is Section 8 in the Puerto Rico Anti-monopoly Act as it was passed by the legislature.

Inexplicably, or perhaps for reasons best understood by the lower court, it ignored this pithy observation that 10 L.P.R. §264 has a dual purpose, made by a legal commentator who helped draft the legislation. Whatever the reason, the omission of this crucial comment is troubling.

Of further note, especially in civil law jurisdictions, is how Julian O. VonKalinowski describes 10 L.P.R. §264 in his treatise on antitrust law. Conspicuously, the treatise, in parsing the Puerto Rico Antitrust Act, does not label 10 L.P.R. §264 an anti-dumping statute at all. Rather, the treatise describes it by label as a "Locality Price Discrimination" measure. VonKalinowski on Antitrust, 2nd ed Vol.7, Chapter 153, at page 153-10.

(D) Nothing in the snippets of legislative history impeaches the plain, ordinary language or meaning of 10 L.P.R. §264 as passed by the legislature and signed by the governor.

It is not surprising that the legislature sought to question only the dumping aspects of 10 L.P.R. §264. The harm caused by discriminatory overcharging is easily understood. F.T.C. v. Morton Salt, 334 U.S. 37, 50 (1948). Dumping, where the consumers get a bargain (albeit temporarily), is not so easily understood. Consequently, the testimony of the statute's proponents dealt with the dumping as part of 10 L.P.R. § 264. In this regard, the Honorable Mr. Reyes Delgado, a legislator, demonstrated the legislative mindset when he challenged the testimony of Secretary of Justice Cancio by commenting: "No, if he sells more cheaply in Puerto Rico all the better. Our people benefit from that." See, Petitioner's Appendix at page 79a. Mr. Reyes Delgado was also upset that a Puerto Rican

company might sell goods cheaper elsewhere, while charging Puerto Rico residents more. He states: "No, no, why, why should we allow our people to be exploited in such a fashion, while the people in Mexico are not. Goods manufactured by the hands of our work force, transported to Mexico . . . and then selling in Mexico at a lower price than here." ibid.

These remarks demonstrate a keen legislative interest in protecting local residents from higher price discrimination, and the legislature satisfied this interest by enacting 10 L.P.R. §264 using the expansive term "different" rather than the limiting term "lower." Thus §264, as enacted, targets both dumping and price discrimination.

Exercise of the Court's supervisory power here is warranted, and the usual preference given a lower court's construction of local law is not earned where there is "plain error," e.g., Palmer v. Hoffman, 318 U.S. 109, 118 (1943); where the decision is "clearly wrong," e.g., The Tungus v. Skovgaard, 358 U.S. 588, 596 (1959); is "unreasonable," e.g., Proper v. Clark, 337 U.S. 472, 489 (1949); or is "clearly erroneous," e.g., U.S. v. Durham Lumber Co., 363 U.S. 522, 526-7 (1960).

The lower Court's holding that "substantially different" means only "substantially lower" to the exclusion of "substantially higher" is to invent "new speak," and enter the Humpty Dumpty world of English usage. [8]

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[8] Lewis Carroll in Through the Looking Glass has Humpty Dumpty explain to Alice: "When I use a word [i]t means just what I choose it to mean – neither more nor less."

This is something this Court has not permitted and should not permit.

(E) Certification as an alternative

Both DJM and Tex-Shield, during Petition for Rehearing phases before the lower Court, have specifically requested that the interpretation of 10 L. P.R. §264 be certified to the Supreme Court of Puerto Rico, pursuant to its Rule 27, 4 L.P.R. App I-A. Resort to the highest court in Puerto Rico is appropriate since the construction of 10 L.P.R. §264 is one of first impression. The Court of Appeals, first finding no ambiguity, then vacating that decision and finding ambiguity, all on the same record, must be disquieting to Puerto Rico businesses. Precedent in this Court permits such a certification, even when not requested, as in Elkins v. Moreno, 435 U.S. 647, 662 n. 16 (1978).

CONCLUSION

The Writ should be granted, or in the alternative, the interpretation of 10 L.P.R. §264 should be certified to the Supreme Court of Puerto Rico.

Respectfully submitted,

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Appendix A – Order on Petition For Rehearing By Court Of Appeals For The First Circuit, entered November 19, 2003 (see Appendix B)

United States Court of Appeals
For the First Circuit

No. 02-2114

DJ MANUFACTURING CORPORATION

Plaintiff - Appellant

v.

TEX-SHIELD, INC.

Defendant - Appellee

XYZ INSURANCE CO.; CREATIVE APPAREL; BLUCHER USA; BLUCHER GMBH Defendants
Defendants

Order of Court Before

Chief Judge Boudin, Torruella, Selya, Lynch, Lipez, and Howard, Circuit Judges

The Panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en bane having been
carefully considered by the judges of the court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the court en banc,

Appendix A

It is ordered that the petition for rehearing and the suggestion for rehearing en bane be denied.

By the Court:
By: RICHARD CUSHING DONOVAN
Richard Cushing Donovan, Clerk

cc: Eugene F. Hestres Velez, Esq.
Rosa Bayonet-Tartak
Marc Lamer
Pedro Jimenez-Rodriguez
Michael McCall
Camelia Montilla-Alvarado
Daniel M. Abuhoff
Timothy K. Beekan

Appendix B – Copy of Docket, Court of Appeals For The First Circuit

US Court of Appeals for the First Circuit
Case Summary

Court of Appeals Docket #: 02-2114 Filed: 9/10/02

Nsuit: 3410 Anti-trust
DJ Manufacturing v. Tex-Shield, Inc., et al Appeal from: U.S. District Court of PR

Lower court information:
District: 0104-3 : 97-01'457 lead: 97-01457
Ordering Judge: Jay A. Garcia-Gregory

10/6/03	ORDER filed by Chief Judge Michael Boudin, Judge Juan R. Torruella, Judge Bruce M. Selya, Judge- Sandra L.Lynch, Judge Kermit V. Lipez and Judge Jeffrey R. Howard. Appellee Tex-Shield's, petition for panel rehearing *is* granted and the petition for rehearing en banc *is denied* as moot. Accordingly, this court's *opinion* of July 28, 2003, withdrawn, and the judgment entered July 28, 2003, *is* vacated. (frnk)
10/20/03	OPINION. Judge Juan R.Torruella, Judge Bruce M. Selya, and Judge Kermit V.Lipez. Signed Judge Juan R. Torruella, Authoring Judge. PUBLISHED. (cmpa)

Appendix B

10/20/03	JUDGMENT. Judge Juan R. Torruella, Judge Bruce M. Selya, and Judge Kermit. V. Lipez. The district court's dismissal of the compliant *is* affirmed. (cmpa)
11/3/03	PETITION filed (fax) by Appellant DJ Manufacturing for panel rehearing and for suggestion for rehearing en banco Certificate of Service dated 10/31/03. (frnk)
11/4/03	ELECTRONIC DOCUMENT. Appellant's petition rehearing and rehearing enbanc on disk. [02-2114] (campa)
11/19/03	ORDER. Chief Judge Boudin, Torruella, Selya, Lynch, Lipez, and Howard, Circuit Judges. The Panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en bane having been carefully considered by the judges of the court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the court en bane, It *is* ordered that the petition for rehearing and the suggestion for rehearing en banc be denied. (cmpa)

Appendix B

11/26/03	MANDATE ISSUED.[02-2114] (frnk)
12/19/03	RECORD returned to originating court. (jani)

Appendix C – Decision by the United States Court of Appeals For The First Circuit on Petition For Rehearing, dated October 20, 2003

United States Court of Appeals
For the First Circuit

No. 02-2114

DJ MANUFACTURING CORPORATION,
Plaintiff, Appellant,

v.

TEX-SHIELD, INC.,
Defendant, Appellee,

XYZ INSURANCE CO., CREATIVE APPAREL,
BLUCHER USA, BLUCHER GMBH.,
Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[Hon. Jay A. García-Gregory, U.S. District Judge]

Before

Torruella, Selya and Lipez,
Circuit Judges.

Appendix C

Marc Lamer, with whom Kostos & Lamer, PC, Eugene F. Hestres and Bird, Bird and Hestres were on brief, for appellant. Timothy K. Beeken, with whom Debevoise & Plimpton, Daniel M. Abuhoff, Correa, Collazo, Herrero, Jiménez & Fortuño and Pedro Jiménez were on brief, for appellee.

ON PETITION FOR REHEARING

October 20, 2003

TORRUELLA, Circuit Judge. Plaintiff-appellant DJ Manufacturing ("DJM") alleges that Tex-Shield, Inc. ("Tex-Shield") and Creative Apparel Associates ("Creative Apparel") violated, inter alia, a Puerto Rican antitrust statute, 10 P.R. Laws Ann.§ 264 (2002), by conspiring to destroy competition in the market for chemical protective clothing in Puerto Rico.[1] The district court dismissed the complaint on a motion to dismiss. After careful review, we affirm.

[1] The plaintiffs also alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, Sections 2(a), (e), and (f) of the Robinson-Patman Act, 15 U.S.C. §§ 13(a), (e), (f), the Puerto Rican statute dealing with price discrimination, 10 L.P.R.A.§ 263, and the Puerto Rican statute dealing with transactions in restraint of trade, 10 L.P.R.A. § 258. The district court's decision is unchallenged with respect to these other claims.

Appendix C

I. Facts

Because this is an appeal from a dismissal under Fed. R. Civ. P. 12(b)(6), "[w]e glean the facts from the amended complaint, stripped of any rhetorical gloss." Young v. Lepone, 305 F.3d 1, 4(1st Cir. 2002).

DJM manufactures sewn clothing and equipage for the United States military. It is a "small disadvantaged business" under 48 C.F.R. § 19.001 (2003) and a certified participant in the Small Business Administration's program for contracts set aside to small disadvantaged businesses under Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (2000).

Defendant Tex-Shield manufactures, and its parent Blucher GmbH holds a patent for, technology used to produce a chemical protective material known as "Saratoga Filter Cloth" (the "Cloth"). The Cloth is a protective shield against biological and chemical agents sewn into garments purchased by the United States military and used for protection against attack by chemical warfare.

In July 1993, the United States Air Force ("USAF")requested bids for the production of 40,000 chemical defense coveralls. The bidding was limited to businesses participating in the SBA's § 8(a) program, such as DJM. The USAF specified that the coveralls must be made using the Cloth and identified Tex-Shield as the sole source. DJM won the contract.

DJM then subcontracted with Tex-Shield to buy the Cloth for a price of $49.27 per yard. Subsequently, DJM and

Appendix C

Tex-Shield made a "technical services" contract, whereby, for a fee of $35,000 per month for twelve months, Tex-Shield agreed to provide DJM with certain technical services.

On June 24, 1994, the Defense Personnel Support Center("DPSC") solicited proposals for the production of at least 100,000 chemical and biological suits, with an option for more. As with the USAF solicitation, the DPSC solicitation was limited to SBA's § 8(a) program participants. Also, the solicitation required the suits be made with the Cloth; again, Tex-Shield was identified as the Cloth's sole approved source.

In preparing its bid for DPSC, DJM inquired as to the cost of procuring the Cloth. Tex-Shield quoted DJM a price of $38.71 per yard for the first 100,000 suits, and $41.07 per yard for any additional yardage. Tex-Shield quoted DJM a price of $148.95 for the first 100,000 suits in pre-cut "kits" and $154.43 per kit for any extra kits. Based on these quotes, DJM offered DPSC a price of $186.62 per unit for the first 100,000 suits and $183.50 for any more suits. Creative Apparel bid $179.55 for the first 100,000 suits and $186.02 for any extra. Creative won the contract.

DJM filed a complaint against Tex-Shield, Blucher USA, Blucher GmbH, and Creative Apparel,[2] alleging several federal and state antitrust violations. The complaint included

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[2] Tex-Shield is wholly owned by Blucher USA, which in turn is wholly owned by Blucher GmbH. Creative Apparel is, like DJM, a clothing and equipage manufacturer. Tex-Shield, the Cloth's sole supplier, also makes finished chemical and biological protective clothing.

allegations that Tex-Shield violated § 264 of the Puerto Rico Anti-Monopoly Act by selling goods in Puerto Rico at prices different from the price at which the articles were sold elsewhere.

The district court dismissed all of the claims, including the § 264 count, for failure to state a cause of action. See Fed.R. Civ. P. 12(b)(6). In dismissing the § 264 count, the district court read the section only as an anti-dumping statute, forbidding the sale of goods at lower prices in Puerto Rico.

DJM appeals only the lower court's dismissal of the § 264 count.

II. Standard of Review

We review the district court's resolution of Tex-Shield's motion to dismiss de novo. Beddall v. State St. Bank & Trust Co.,137 F.3d 12, 16 (1st Cir. 1998). When a litigant is facing a summary dismissal, we first accept the complaint's well-pleaded factual allegations as true, drawing all reasonable inferences in the plaintiff's favor, and then determine whether this reading of the complaint justifies recovery on any cognizable theory. Martin v. Applied Cellular Tech., Inc., 284 F.3d 1, 6 (1st Cir. 2002).

III. Analysis

We begin with the issue of statutory interpretation. The district court limited the interpretation of the phrase "at prices which are substantially different" contained in § 264 of

the Puerto Rico statute to only those situations where a supplier offers its product at a substantially lower price to Puerto Rican customers as opposed to non-Puerto Rican customers, and ruled out those situations where a supplier charged the Puerto Rican company substantially more than a non-Puerto Rican company.

Neither this circuit nor the Puerto Rican commonwealth courts have determined the pricing behaviors covered by § 264. DJM contends that the statute prohibits charging either less or more for goods in Puerto Rico. Thus, DJM argues that the district court erred when it viewed the statute as an anti-dumping statute that prohibits only the charging of lower prices in Puerto Rico. Finally, DJM argues that § 264 is clear on its face and that we should thus refrain from examining its legislative history. We disagree -- as will be explained, we find the statute ambiguous and turn to other sources for aid in construction.

A. Ambiguity

Section 264 states:

> It shall be unlawful to sell, contract to sell, offer to sell, or participate in any step for the sale of articles in Puerto Rico, after making due allowance for differences in costs incident to the delivering of goods in Puerto Rico and the costs of handling such goods in Puerto Rico, at prices which are substantially different from prices charged or quoted by such sellers for goods of the same grade or quality to buyers located outside of Puerto Rico, when such difference in price is granted with the

> purpose of destroying competition or eliminating a competitor located in Puerto Rico.

10 P.R. Laws Ann. § 264. Although DJM would have us consider only the whether the phrase "prices which are substantially different" ("different price language") could, on its face, apply to the charging of higher and lower prices, we must consider the phrase in the context of the entire statutory provision in order to determine if the statute covers situations such as the one alleged here. See, e.g., Allied Chem. and Alkali Workers of Am. Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 185 (1971) (indicating that courts "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law")(internal quotations and citations omitted).

We begin by noting that the different price language does not appear ambiguous when considered in isolation. Unlike the Federal Anti-Dumping Act of 1916, which the district court viewed as a model for this statute, there is no specific prohibition against charging "a price substantially less" in Puerto Rico -- instead the legislature chose the broader term "substantially different," which could cover both higher and lower pricing.[3] Although it

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[3] The Federal Anti-Dumping Act reads in pertinent part:

> It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal

may appear quite obvious that the word "different" could encompass both higher and lower prices, this does not mean that the statute is unambiguous and that it clearly encompasses DJM's claim.

When we consider whether the statute as a whole encompasses DJM's claim, its ambiguity emerges. In particular, here we have a situation where the alleged price discrimination is having a potential detrimental effect not on the seller's competition (horizontal competition or competitors), but rather on the buyer's competition (vertical competition or competitors). On its face, the statute does not clearly encompass claims involving harm to vertical competitors caused by the charging of higher prices in Puerto Rico.

> markets of the country of their production, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: Provided, that such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.

15 U.S.C. § 72 (2003) (emphasis added). Clearly, the Puerto Rican legislature did not merely adopt the provision wholesale, but rather changed significant portions of it.

Appendix C

The Robinson-Patman Act, on which this statutory provision was loosely modeled,[4] has been applied to secondary line competition and does explicitly cover effects on non-sellers. See 15 U.S.C. § 13 (2003) (stating "[i]t shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality . . .where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them").

State statutes that cover behavior affecting secondary line competition do not typically have explicit terms to that effect -- quite the contrary, where secondary line competition is not covered, the statutes are explicit. See, e.g., Cal. Bus. & Prof. Code § 17040 (2003) (prohibiting price discrimination in a given locality by "any person engaged in the production, manufacture, distribution or sale of any article or product of general use or consumption, with intent to destroy the competition of any regular established dealer in such article or product"); see also Erwin S. Barbre, Annotation, Validity and Construction of State Statutes Forbidding Area Price Discrimination, 67 A.L.R.3d 26(2001) (citing only three cases involving a finding that state statutes did not apply to secondary line competition).

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[4] See Arturo Estrella, Antitrust Law in Puerto Rico, 28 Revista del Colegio de Abogados de Puerto Rico, 505, 624-25 (1968).

Appendix C

Absent an explicit term to the contrary, § 264 could apply to secondary line competition, thus encompassing DJM's claim. It is precisely because the statute could but does not explicitly encompass DJM's claim that consultation of other sources would be not only prudent, but necessary. See, e.g., United States v. O'Neil, 11 F.3d 292, 297-98 (1st Cir. 1993) (noting that "ambiguity is commonly thought to exist when statutory language is susceptible to differing, but nonetheless plausible, constructions").

B. Legislative History

As will presently be seen, the legislative history[5] clarifies that the different price language was meant to apply only to the charging of lower prices. Although on its face the different price language may appear to include the charging of higher or lower prices, "[e]ven the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent." National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974). Indeed, the First Circuit has "overridden literal language where it appeared inadvertent and undermined [the legislature's] aim." United States v. Estrella, 104 F.3d 3, 8 (1st Cir. 1997).

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[5] We assume that the official translations included in the record contain all relevant portions of the legislative history. See, e.g., Estades Negroni v. Assocs. Corp. of N. Am., 2003 U.S. App.LEXIS 20066, *11 (1st Cir. 2003) (reiterating that "'this Court may not consider non-English documents unless a translation is provided'") (quoting Ramos-Báez v. Bossolo-López, 240 F.3d 92, 94(1st Cir. 2001).

Appendix C

The legislative history supports a narrow reading of § 264 as an anti-dumping statute. Most persuasively, a section in the Senate committee report indicates that "[t]he purpose of this section is not to prevent merchandise from entering Puerto Rico at prices that are lower than those prevalent in other markets. The prohibition is limited to classic dumping." Diario de Sesiones, Vol. XVIII, at 1708.

Similarly, an article written by Arturo Estrella, the then Deputy Secretary of Justice, a few years after the enactment of § 264 indicates that the law's "main purpose - though not the exact wording - coincides with that of the United States Anti-Dumping Act of 1916, prohibiting importation into the United States of articles for sale at prices that are less than their market value outside the United States . . ." Arturo Estrella, Antitrust Law in Puerto Rico, 28 Revista del Colegio de Abogados de Puerto Rico 505, 624-25 (1968).

According to DJM, the fact that this is the main purpose of the statute allows for the interpretation that § 264 also applies to the charging of higher prices in Puerto Rico. If one reads the entire excerpt, however, it is clear that this reading is not possible because Estrella states, "The phrase 'substantially different' was used with the intention of outlawing 'lower prices.'" Id. (quoting Diario de Sesiones, Vol. XVIII, at 1708).

Although there are only limited portions of legislative history in the record,[6] those excerpts indicate

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[6] Only Tex-Shield has provided excerpts of legislative history for this Court's consideration. In its response brief, DJM merely analyzes the excerpts provided by its opponents and does not bring to the Court's

that the statute was meant to apply only to lower prices. We interpret the statute narrowly and hold that it does not embrace the charging of higher prices by a supplier to a Puerto Rican company.

Dumping behavior is not alleged here, thus DJM has failed to state a valid claim under the statute and the district court properly dismissed the complaint.[7]

III. Conclusion

For the foregoing reasons, the district court's dismissal of the complaint is affirmed.

Affirmed.

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attention any other relevant portions of the legislative history. Previously, DJM relied on a plain language argument rather than resorting to legislative history, which certainly suggests that there is little or no history to support DJMs interpretation.

[7] With regard to the issue of whether the statute applies to vertical competition, none of the excerpted portions of the legislative history brought to the Court's attention address the issue. We need not decide if the statute covers both vertical and horizontal competition, however, because we find that only cases involving the charging of lower prices in Puerto Rico can be brought under the provision.

Appendix D – Decision By The United States Court of Appeals For The First Circuit, dated July 28, 2003 (withdrawn)

United States Court of Appeals
For the First Circuit

No. 02-2114

DJ MANUFACTURING CORPORATION,
Plaintiff, Appellant,

v.

TEX-SHIELD, INC.,
Defendant, Appellee,

XYZ INSURANCE CO., CREATIVE APPAREL, BLUCHER USA, BLUCHER GMBH.,

Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO
[Hon. Jay A. García-Gregory, U.S. District Judge]

Before

Appendix D

Torruella, Selya and Lipez,
Circuit Judges.

Marc Lamer, with whom Kostos & Lamer, PC, Eugene F. Hestres and Bird, Bird and Hestres were on brief, for appellant. Timothy K. Beeken, with whom Debevoise & Plimpton, Daniel M. Abuhoff, Correa, Collazo, Herrero, Jiménez & Fortuño and Pedro Jiménez were on brief, for appellee.

July 28, 2003

TORRUELLA, Circuit Judge. Plaintiff-appellant DJ Manufacturing ("DJM") alleges that Tex-Shield, Inc. ("Tex-Shield")and Creative Apparel Associates ("Creative Apparel") violated, inter alia, a Puerto Rican antitrust statute, 10 P.R. Laws Ann. § 264 (2002), by conspiring to destroy competition in the market for chemical protective clothing in Puerto Rico.[1] The district court dismissed the complaint on a motion to dismiss. After careful review, we reverse and remand for further proceedings.

I. Facts

[1] The plaintiffs also alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, Sections 2(a), (e), and (f)of the Robinson-Patman Act, 15 U.S.C. §§ 13(a), (e), (f), the Puerto Rican statute dealing with price discrimination, 10 L.P.R.A. § 263, and the Puerto Rican statute dealing with transactions in restraint of trade, 10 L.P.R.A. § 258. The district court's decision is unchallenged with respect to these other claims.

Appendix D

Because this is an appeal from a dismissal under Fed. R. Civ. P. Rule 12(b)(6), "[w]e glean the facts from the amended complaint, stripped of any rhetorical gloss." Young v. Lepone, 305 F.3d 1, 4 (1st Cir. 2002).

DJM manufactures sewn clothing and equipage for the United States military. It is a "small disadvantaged business" under 48 C.F.R. § 19.001 (2003) (and a certified participant in the Small Business Administration's program for contracts set aside to small disadvantaged businesses under Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (2000).

Defendant Tex-Shield manufactures, and its parent Blucher GmbH holds a patent for, technology used to produce a chemical protective material known as "Saratoga Filter Cloth" (the "Cloth"). The Cloth is a protective shield against biological and chemical agents sewn into garments purchased by the United States military and used for protection against attack by chemical warfare.

In July 1993, the United States Air Force ("USAF") requested bids for the production of 40,000 Chemical Defense Coveralls. The bidding was limited to businesses participating in the SBA's § 8(a) program, such as DJM. The USAF specified that the coveralls must be made using the Cloth and identified Tex-Shield as the sole source. DJM won the contract.

DJM then subcontracted with Tex-Shield to buy the Cloth for a price of $49.27 per yard. Subsequently, DJM and Tex-Shield made a "technical services" contract, whereby,

for a fee of $35,000 per month for twelve months, Tex-Shield agreed to provide DJM with certain technical services.

On June 24, 1994, the Defense Personnel Support Center ("DPSC") solicited proposals for the production of at least 100,000 chemical and biological suits, with an option for more. As with the USAF solicitation, the DPSC solicitation was limited to SBA's § 8(a) program participants. Also, the solicitation required the suits be made with the Cloth; again, Tex-Shield was identified as the Cloth's sole approved source.

In preparing its bid for DPSC, DJM inquired as to the cost of procuring the Cloth. Tex-Shield quoted DJM a price of $38.71 per yard for the first 100,000 suits, and $41.07 per yard for any additional yardage. Tex-Shield quoted DJM a price of $148.95 for the first 100,000 suits in pre-cut "kits" and $154.43 per kit for any extra kits. Based on these quotes, DJM offered DPSC a price of $186.62 per unit for the first 100,000 suits and $183.50 for any more suits. Creative Apparel bid $179.55 for the first 100,000 suits and $186.02 for any extra. Creative won the contract.

DJM filed a complaint against Tex-Shield, Blucher USA, Blucher GmbH, and Creative Apparel,[2] alleging several federal and state antitrust violations. The complaint included allegations that Tex-Shield violated § 264 of the Puerto Rico

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[2] Tex-Shield is wholly-owned by Blucher USA, which in turn is wholly-owned by Blucher GmbH. Creative Apparel is, like DJM, a clothing and equipage manufacturer. Tex-Shield, the Cloth's sole supplier, also makes finished chemical and biological protective clothing.

Anti-Monopoly Act by selling goods in Puerto Rico at prices different from the articles' price when sold elsewhere.

The district court dismissed all of the consolidated actions, including the § 264 count, for failure to state a cause of action. See Fed. R. Civ. P. 12(b)(6). In dismissing the § 264 count, the district court read the section only as an anti-dumping statute, forbidding the sale of goods at lower prices in Puerto Rico.

DJM appeals only the lower court's dismissal of the § 264 count, as DJM waived all other appealable errors.

II. Standard of Review

We review the district court's resolution of Tex-Shield's motion to dismiss de novo. Beddall v. State St. Bank & Trust Co., 137 F.3d 12, 16 (1st Cir. 1998). When a litigant is facing a summary dismissal, we first accept the complaint's well-pleaded factual allegations as true, drawing all reasonable inferences in the plaintiff's favor, and then determine whether this reading of the complaint justifies recovery on any cognizable theory. Martin v. Applied Cellular Tech., Inc., 284 F.3d 1, 6 (1st Cir. 2002). Summary disposals "should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of alleged conspirators, and hostile witnesses thicken the plot." Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 473 (1962).

Appendix D

III. Analysis

Two issues require discussion. First, we consider if the district court erred when it limited the interpretation of the phrase "at prices which are substantially different" to only those situations where a supplier offers its product at a substantially lower price to Puerto Rican customers as opposed to non-Puerto Rican customers, and ruled out those situations where a supplier charged the Puerto Rican company substantially more than a non-Puerto Rican company. Second, we decide if DJM's complaint alleges sufficient facts to establish a § 264 claim, including whether the complaint at least inferentially asserts that (1) Tex-Shield's alleged conduct is aimed at "destroying competition or eliminating a competitor located in Puerto Rico"; and (2) the goods at issue are of the same grade or quality.

A. Statutory Interpretation

Neither this circuit nor the Puerto Rican commonwealth courts have determined the pricing behaviors covered by § 264. DJM contends that the statute prohibits charging either less or more for goods in Puerto Rico. Thus, DJM argues that the district court erred when it viewed the statute as an anti-dumping statute that prohibits only the charging of lower prices in Puerto Rico.
Finally, DJM argues that § 264 is clear on its face and that we should thus refrain from examining its legislative history. We agree.

Where the statute's language is clear, and its terms do not lead to "absurd or wholly impracticable consequences," the words used are generally taken as the final expression of

the intended meaning. Caminetti v. United States, 242 U.S. 470, 490(1917); see also United States v. Mo. Pac. R.R., 278 U.S. 269, 277-78 (1929) ("where no ambiguity exists, there is no room for construction"). Although different canons of statutory construction may apply when construing statutes in a civil code system as opposed to statutes in a common law system, we need not concern ourselves with these differences because the Puerto Rico legislature provides a clear command as to the first step of civil code interpretation: "When a law is clear and free from all ambiguity, the letter of the same shall not be disregarded, under the pretext of fulfilling the spirit thereof." 31 P.R. Laws Ann.§ 14 (1967 & Supp. 1989); see also Pritzker v. Yari, 42 F.3d 53, 66-67 (1st Cir. 1994) (declining to "wander beyond the four corners" of a Puerto Rican statute to discern "legislative intent").

Here, the statute is clear regarding the pricing behavior it targets. Section 264 states:

> It shall be unlawful to sell, contract to sell, offer to sell, or participate in any step for the sale of articles in Puerto Rico, after making due allowance for differences in costs incident to the delivering of goods in Puerto Rico and the costs of handling such goods in Puerto Rico, at prices which are substantially different from prices charged or quoted by such sellers for goods of the same grade or quality to buyers located outside of Puerto Rico, when such difference in price is granted with the purpose of destroying competition or eliminating a competitor located in Puerto Rico.

Appendix D

10 P.R. Laws Ann. § 264 (emphasis added). Unlike the Federal Anti-Dumping Act of 1916, which the district court adopted as the definitive model for this statute, there is no specific prohibition against charging "a price substantially less" in Puerto Rico --instead the legislature chose the broader term "substantially different," which covers both higher and lower pricing.[3]

Because we hold the statutory language embraces both higher and lower prices on its face, we need not enter the quagmire of legislative history or use other tools of

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[3] The Federal Anti-Dumping Act reads in pertinent part:

> It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: Provided, That such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.

15 U.S.C. § 72 (2003) (emphasis added). Clearly, the Puerto Rican legislature did not merely adopt the provision wholesale, but rather changed significant portions of it.

construction. The district court judge erred in interpreting the provision too narrowly, and that interpretation is reversed.

B. Sufficiency of Factual Allegations

Having decided the statute includes both higher and lower price discrimination, we consider whether the complaint's allegations and any logical inferences therefrom "justify recovery on any cognizable theory." Martin, 284 F.3d at 6.

Here, DJM claims that the prices Tex-Shield charged to Creative Apparel were lower than those quoted to DJM plainly suffice to survive dismissal.

Even if the statute applies to the alleged charging of higher prices in Puerto Rico, there are still two possible obstacles to stating a claim under § 264. First, § 264 prohibits a supplier from charging different prices for the purpose of destroying the supplier's "competition or eliminating a competitor located in Puerto Rico." Second, § 264 requires that the goods be of "the same grade and quality." The district court did not address either issue; taking all inferences in DJM's favor, we find the district court erred in dismissing the complaint.[4]

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[4] This is not a case in which the district court converted the 12(b)(6) motion into a motion for summary judgment.

Appendix D

1. Adverse Impact on Competition or Competitor

A well-pleaded § 264 claim must include allegations that the price discrimination was for "the purpose of destroying competition or eliminating a competitor located in Puerto Rico."
In its complaint, DJM contends that Tex-Shield and Creative Apparel entered into "an agreement" involving, among other things, investment by Tex-Shield in Creative Apparel as part of a joint strategy to secure and maintain for the Blucher defendants monopoly power in United States trade and commerce in Chemical Protective Cloth . . . and to attempt to secure and maintain, and to secure and maintain, monopoly power for Creative [Apparel] in United States trade and commerce in Chemical Protective Clothing, as well as in such trade and commerce in the § 8(a) market.

It is not irrational for a monopoly-holder such as Tex-Shield to act with the intent of sabotaging one of its two customers.[5] Such a concerted effort to establish and maintain monopoly power in the relevant markets, if proven, would meet § 264's purpose requirement because it would constitute an intent to harm competition in the chemical protective clothing market or eliminate DJM as Creative Apparel's

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[5] Both the allegation that Tex-Shield is building "additional manufacturing operations" near Creative Apparel's plant and the claim that Tex-Shield is investing in Creative Apparel to "enhance its financial condition" could, if proven, support a finding of an anti-competitive purpose to the price differential. Both of these facts suggest a special relationship between Tex-Shield and Creative Apparel that would make it logical for them to conspire to destroy competition in the chemical protective clothing market.

competitor; thus, DJM's pleadings on this count suffice to meet § 264's intent requirement. Compare In re Compact Disc Minimum Advertised Price Antitrust Litig., 138 F. Supp. 2d 25, 28 n.4 (D. Me. 2001) (denying motion to dismiss where it was "not irrational or implausible to infer agreement from the facts alleged"), with DM Research, Inc. v. Coll. of Am. Pathologists, 170 F.3d 53, 55-56 (1st Cir. 1999) (affirming dismissal where complaint "merely assert[ed] a conspiracy in conclusory terms" and stating that allegation of some fact pertaining to an agreement would be necessary to overcome the improbability of a conspiracy against the interests of one or more of the parties).

2. Goods of Same Grade and Quality

Finally, § 264 requires that DJM allege that Tex-Shield was quoting different prices for "goods of the same grade or quality." Defendants argue that "the goods for which DJM requested a price -- pre-cut fabric kits -- were not the same grade or quality as the goods on which Creative Apparel requested a price --uncut cloth on the roll." Although this argument may ultimately have merit, it does not preclude inferences from the complaint sufficient to defeat a Rule 12(b)(6) motion.

It is possible to infer from the complaint that the goods at issue were of the same grade and quality. According to the complaint, a DPSC report indicates that "Defendant Tex-shield had, in fact, offered the Blucher Chemical Protective Cloth to Creative at a significantly lower price than it had offered the cloth to DJM." Given that the final product, the chemical protective clothing, had to be produced according to military specifications that

included use of the Cloth, it is a reasonable inference -- without considering any contrary proof that the goods at issue (the Cloth) had to be of the same grade and quality.[6] Cf. Arruda v. Sears, Roebuck & Co., 310 F.3d 13, 18(1st Cir. 2002)(indicating that in evaluating propriety of 12(b)(6) motion, the court must "assume the truth of all well-pleaded facts and indulge all reasonable inferences therefrom that fit the plaintiff's stated theory of liability").

IV. Conclusion

For the foregoing reasons, the district court's dismissal of the complaint is reversed and the case is remanded for further proceedings consistent with this

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[6] We find the defendant's reliance on Lubbock Glass & Mirror Co. v. Pittsburgh Plate Glass Co., 313 F. Supp. 1184, 1187, (N.D. Tex. 1970), unfounded. In Lubbock Glass, the court found that glass, doors frames and windows could not be considered of like kind and quality when conveyed in different contracting jobs, because "intangible items, such as installation, weather conditions, the architect or contractor in charge of the job and other intangibles make each job unique or different." Id. at 1185. Further the court stated that

> commercial installed contracts . . . are a combination of many ingredients, none of which are subject to exact calculation. A difference in one ingredient could and probably would occasion a difference in the total price or bid. Apparently, someone calculating a bid for a commercial installed contract cannot even determine exactly the material costs involved.

Id. at 1186-87. The Cloth needed by both DJM and Creative is the same and the costs involved are easily estimated, as shown by DJM's own calculation of cutting costs.

opinion. We intimate no view as to whether, after pretrial discovery, trialworthy issues will be shown to exist.

Reversed and remanded.

Appendix E – Opinion and Order by the United States District Court for the District of Puerto Rico, dated June 28, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

DJ MANUFACTURING CORP. Plaintiff v. TEX-SHIELD, INC., BLUCHER GMBH, BLUCHER USA, and CREATIVE APPAREL. Defendants.	Civil No. 97-1457 (JAG) Antitrust
DJ MANUFACTURING CORP. Plaintiff v. BLUCHER GMBH, BLUCHER USA, and CREATIVE APPAREL. Defendants.	Civil No. 98-2065 (JAG) Antitrust

OPINION AND ORDER

Plaintiff DJ Manufacturing Corporation ("DJM") a corporation organized under the laws of the Commonwealth

of Puerto Rico, brought suit against Blucher GmbH ("Blucher"), a German Corporation with headquarters located in Erkrath, Germany, its wholly owned subsidiaries Tex-Shield ("Tex-Shield") and Blucher USA ("Blucher USA"), both Delaware corporations with offices and principal place of business in New Jersey, and Creative Apparel Associates ("Creative"), a foreign corporation with offices and principal place of business in Maine. DJM brought this action pursuant to the provisions of 15 U.S.C. §§ 15 and 26 to recover damages for defendants' alleged violations of the antitrust laws of the United States, specifically sections 1 and 2 of the Sherman Act, sections 2(a) and 2(f) of the Clayton Act as amended by the Robinson-Patman Act ("Robinson-Patman Act"). DJM also sets forth state law claims under 10 L.P.R.A. §§ 258, 263, 264 ("Puerto Rico Antimonopoly Act").

Pending before the Court are defendants' Tex-Shield's and Blucher's motions to dismiss pursuant to Fed. R. Civ. P. 12(b) (6) (Dockets. No. 77 and 96 respectively) and Plaintiff's Motion for Entry of Partial Summary Judgment (Docket No. 104, 108 and 115, respectively). For the reasons stated below defendants' Tex-Shield's and Blucher's Motion to Dismiss ate **GRANTED**. DJM's Motion for Entry of Partial Summary Judgment is **MOOT**.

FACTUAL BACKGROUND

DJM is a corporation that manufactures complex sewn clothing and equipage for the United States military agencies. It is a small disadvantaged business as that term is

used in regulations governing federal contracts[1], and it is a certified participant in the Small Business Administration's ("SBA") 8(a) program for contracts set aside to small disadvantaged businesses, including contracts with United States military agencies and departments[2].

Defendant Tex-Shield manufactures and holds a patent for certain technology used to produce a chemical protective material known as "Saratoga Filter Cloth" that is sewn into chemical protective garments purchased by agencies and departments of the United States Military.

In July 1993 the United States Air Force ('USAF") issued a solicitation for bids for the sale of 40,000 Chemical Defense Coveralls. The procurement was limited to businesses participating in the SBA's 8(a) program, such as DJM. The USAF specified that the coveralls must be manufactured using Saratoga Filter Cloth. Tex-Shield was identified as the sole approved source for the Cloth. DJM was awarded the contract for the Air Force solicitation for 40,000 coveralls at a unit price of $376.15 for a total contract price of $15,006,000.

After DJM was awarded the USAF contract, DJM and Tex-Shield entered into a subcontract which provided that DJM would buy the Saratoga Filter Cloth from Tex-Shield at a price of $49.27 per yard. Subsequently, DJM and Tex-Shield entered into a "technical services" contract

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[1] See 48 C.F.R. 19.001

[2] See § 8 (a) of the Small Business Act, 15 U.S.C. § 637(a) ("8(a) program").

whereby Tex-Shield agreed to provide DJM with certain technical services for a fee of $35,000 per month for a twelve (12) month period.

On June 24, 1994, the Defense Personnel Support Center ("DPSC") issued a solicitation for proposals for the sale of a minimum of 100,000 chemical and biological suits and an additional quantity at the option of the DPSC. Just like the Air Force Solicitation, the DPSC Solicitation was limited to SBA's 8(a) program participants. The solicitation also required that the suits be manufactured from the Saratoga Filter Cloth produced with the Blucher Technology; again Tex-Shield was identified as the sole approved source for the cloth.

Pursuant to the DPSC solicitation, Tex-Shield quoted DJM a price of $38.71 per yard for the first 100,000 suits, and $42.07 per yard for any additional quantity. Tex-Shield also sent DJM a quote to sell the Saratoga Cloth in the form of pre-cut "kits" at $148.95 for the first 100,000 suits and $154.43 for any additional quantity. In light of these numbers, DJM offered DPSC a price of $186.62 per unit for the first 100,000 suits and $183.50 for any additional quantity. This time, however, DJM was not awarded the DPSC contract; instead the DPSC selected Creative. Creative submitted a bid of $179.55 for the first 100,000 suits and $186.02 for any additional quantity[3].

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[3] In its Amended Complaint, DJM does not specify the price Tex-Shield quoted to Creative. DJM simply avers that Tex-Shield offered Creative, "Blucher Protective Cloth at a significantly lower price than the price quoted and offered to DJM...."

Appendix E

MOTION TO DISMISS STANDARD

Under Rule 12(b) (6) of the Federal Rules of Civil Procedure, a party may, in response to an initial pleading, file a motion to dismiss the complaint for failure to state a claim upon which relief can be granted. It is well settled that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." See Ports Authority of P.R. V. Copañia Panameña de Aviación, 77 F. Supp.2d 227, 228 (D.P.R. 1999); citing Conley v. Gibson, 355 U.S. 41, 46-46, (1957); and Miranda v. Ponce Fed. Bank, 948 F.2d 41 (1st Cir. 1991).

On a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b) (6) "all well-pleaded facts are taken as true, and ...all reasonable inferences are drawn in favor of the nonmovant." Gutierrez-Usera v. Puerto Rico Telephone Co., 967 F. Supp. 35, 37 (D.P.R. 1997). A complaint must set forth "factual allegations either direct or inferential, regarding each material element necessary to sustain recovery under some actionable theory." See Ports Authority, 77 F. Supp.2d at 229; citing Romero-Barceló v. Hernández Agosto, 75 F. 3d 23, 28 n. 2 (1st Cir. 1996). The Court, however, need not accept a complaint's "bald assertions or legal conclusions" when assessing a motion to dismiss. Id., quoting Abbott III v. United States, 144 F. 3d 1, 2 (1st Cir.1988), (citing Shaw v. Digital Equip. Corp., 82 F 3d 1194, 1216 (1st Cir. 1996)).

Appendix E

Whether DJM will ultimately have enough evidence to withstand summary judgment and persuade a jury as to the validity of its claims remains to be seen. The question here, however, is whether it has alleged enough to survive the motions to dismiss. The Court of Appeals for the First Circuit has repeatedly cautioned that Rule 12 (b) (6) is not entirely a toothless tiger. "Minimal requirements are not tantamount to nonexistent requirements. The threshold [for stating a claim] may be low, but it is real. . ." Thus, plaintiffs are obliged to set forth in their complaint "factual allegations, either direct or inferential, regarding each material element necessary to sustain recovery under some actionable legal theory." Dartmouth Review v. Dartmouth College, 889 F. 2d 13, 16 (1st Cir. 1989), citing Gooley v. Mobil Oil Corp., 851 F. 2d 513, 514 (1st Cir. 1988). In the antitrust context, a complaint containing vague pleadings lacking the requisite factual allegations of an antitrust claim is insufficient to state a cause of action. Gilbuilt Homes, Inc. v. Continental Homes of New England, 667 F. 2d 209 (1st Cir. 1981).

PLAINTIFF'S ANTITRUST CLAIMS AS SET FORTH IN THE AMENDED COMPLAINT

Plaintiff claims in its Amended Complaint that the Blucher defendants and Tex-Shield have unlawfully retrained trade or commerce under Section 1 of the Sherman Act[4]. Plaintiff also claims that, having acquired monopoly

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[4] Section 1 of the Sherman Act proscribes contracts, combinations, and conspiracies "in restraint of trade or commerce among the several States." See 15 U.S.C. § 1

power in the relevant line of commerce, have unlawfully exercised such monopoly power in violation of Section 2 of the Sherman Act. 15 U.S.C. § 2[5].

Plaintiff further maintains that by offering to sell and selling Saratoga Filter Cloth at higher price to DJM in Puerto Rico than the prices offered and charged to Creative in Maine for goods of like grade and quality, all sales being in interstate commerce, Tex-Shield and the Blucher defendants substantially lessened competition in the relevant market, in violation of Sections 2 (a) and (e) of the Robinson-Patman Act. 15 U.S.C. §§ 13 (a), (e)[6]. DJM also claims that

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[5] Section 2 makes it illegal to:

> "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce among the several States. . . ." See 15 U.S.C. § 2

[6] Section 2 states:

(a) Price; Selection of Customers

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or injure, destroy, or prevent competition. . .

(e) Furnishing services or facilities for processing, handling, etc.

It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of commodities bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sales, or offering of

Appendix E

Creative, knowingly solicited or induced and received favorable discriminatory treatment in violation of Section 2(f) of the Robinson-Patman Act. 15 U.S.C. § 13(f)[7]. DJM maintains that the effect of such conduct has been to substantially lessen competition, tending to create a monopoly and destroy competition in the relevant market and has impaired DJM's ability to compete in such line of commerce. DJM asserts that the defendants' discriminatory conduct has foreclosed competition in the relevant market, in violation of Section 2 of the Robinson-Patman Act.

DJM argues that through concerted conduct in connection with the manufacture, sale and distribution of Saratoga Filter Cloth and chemical protective clothing in the relevant market:

> 1. The Blucher defendants and Tex-Shield have used their monopoly power over the Saratoga Filter Cloth and have leveraged and extended their power to control prices and to exclude competitors in the 8(a) business segment;

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sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.
(Emphasis in Original)

[7] Section 2 states:
(F) Knowingly inducing or receiving discriminatory price
It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.
(Emphasis in Original)

2. Competition in the manufacture and sale of chemical protective clothing in the relevant market has been unreasonably restrained;

3. DJM has suffered antitrust injury by being rendered unable to purchase, at non-discriminatory prices, a vital, required manufacturing input necessary for it to engage in the manufacture and sale of chemical protective clothing. Unless defendants are enjoined or the requested relief is granted, DJM will be effectively eliminated as a competitor in the relevant line of commerce;

4. The effect of such conduct will be to substantially lessen competition and tend to create a monopoly in the manufacture and sale of chemical protective clothing in the relevant market.

DJM also claims that both the Blucher defendants and Tex-Shield violated Puerto Rico's antitrust law[8]. In their view, DJM alleges that the Blucher defendants in

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[8] These alleged violation of Puerto Rico's antitrust laws more or less parallel the violations of federal antitrust laws set forth in the Amended Complaint. The relevant sections of the Puerto Rico Monopoly Act invoked by DJM are patterned after their federal counterparts. We will, therefore, use federal antitrust case law as a guide in interpreting the Puerto Rico laws, especially given the dearth of Puerto Rico case law on these statutes. Therefore, unless otherwise specified, our analysis and application of federal antitrust case law and statutes to the facts and claims set forth by DJM will be equally applicable to its Puerto Rico Monopoly Act claims. See, e.g., See Coastal Fuels of P.R. v. Caribbean Petroleum, 79 F. 3d 182 (1st Cir. 1996).

combination with Tex-Shield offered and sold the Saratoga Filter Cloth, in a series of sales outside of Puerto Rico for less than the Cloth was offered and sold to Plaintiff in Puerto Rico, after making due allowance for (a) the costs incident to the delivery of goods in Puerto Rico, (b) the costs of handling such goods in Puerto Rico, and (c) the costs of the basic cloth. According to DJM this conduct constituted unlawful discrimination in price and furnishing of services and facilities in violation of 10 L.P.R.A. §263[9].

DJM also claims that the Blucher defendants, in combination with Tex-Shield, and others, unlawfully sold and offered to sell Saratoga Filter Cloth in Puerto Rico at prices substantially different from the prices which Tex-Shield quoted and sold these same goods outside of Puerto Rico after making due allowance for differences in costs incident to the delivery and handling of the goods in Puerto Rico, with the purpose of destroying competition and

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[9] Section 263 states:

(a) It shall be unlawful for any person, either directly or indirectly, to discriminate in price between different purchasers of commodities are sold for use, consumption, or resale in Puerto Rico, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce in Puerto Rico or to injure, destroy, or prevent competition. . .

(b) It shall be unlawful for any person to pay or contract for the payment, or contract contribute to the payment of anything of value to or for the benefit of a customer of such person as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities in Puerto Rico.

eliminating DJM as a competitor, all in violation of 10 L.P.R.A. § 264[10].

DJM further alleges that the Blucher defendants in conspiracy with Tex-Shield and Creative, unreasonably restrained trade by selling Saratoga Filter Cloth to Creative and others at a substantially lower price than had it agreed to sell to plaintiff, in violation of 10 L.P.R.A. § 258[11].

In response to DJM's claims, defendants argue, in addition to their insufficiency as a matter of law, that all claims under the Air Force contract are barred because DJM has already litigated them and are therefore res judicata. DJM acknowledges that the claims under the Air Force procurement are res judicata by virtue of arbitration proceedings held between DJM and Tex-Shield. Accordingly these claims will be dismissed and the Court will not address them in this opinion. We proceed,

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[10] Section 264 states:

It shall be unlawful to sell, contract to sell, offer to sell, or to participate in any step for the sale of articles in Puerto Rico, after making due allowance for differences in costs incident to the delivering of goods in Puerto Rico and the costs of handling such goods in Puerto Rico, at prices which are substantially different from the prices charged or quoted by such sellers for goods of the same grade or quality to buyers located outside of Puerto Rico, when such difference is granted with the purpose of destroying competition or eliminating a competitor located in Puerto Rico.

[11] Section 258 states:

Every contract, combination in the form of trust or otherwise, or conspiracy in unreasonable restraint of trade or commerce ... is hereby declared illegal ...

therefore, to address the antitrust claims challenged as insufficient by defendants in the same order that they are discussed in the motion to dismiss.

DISCUSSION

I. Conspiracy to Restrain Trade and Attempt to Monopolize.

DJM alleges that Tex-Shield in combination with Blucher and Creative, unreasonably restrained trade and commerce by selling Saratoga Filter Cloth at a substantially lesser price than it had offered to sell to DJM in violation of § 1 of the Sherman Act, 15 U.S.C. § 1 and 10 L.P.R.A. § 258, Puerto Rico's equivalent to § 1 of the Sherman Act. DJM also alleges that Tex-Shield conspired with Creative to use its monopoly power over its patented Saratoga Filter Cloth to control prices, exclude competitors and gain monopoly over the 8(a) market in violation of section 2 of the Sherman Act, 15 U.S.C. § 2.

i. **Unlawful Restraint of Trade Claims**

DJM's allegations regarding Blucher's and Tex-Shield's conspiracy in restraint of trade under § 1 of the Sherman Act are without merit. In antitrust parlance, the term conspiracy has been construed as a synonym for agreement. Although nothing in the literal meaning of the Sherman Act excludes coordinated conduct among divisions of a corporation or between a parent corporation and its wholly-owned subsidiary, the Supreme Court has established

that coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purpose the Sherman Act. See Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771 (1984). A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but only by one. Id. With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do "agree" to undertake a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for Sherman Act scrutiny. Id. Because the ultimate interests of the subsidiary and the parent are identical, the parent and the subsidiary must be viewed as a single economic unit, and hence, legally incapable of conspiring with each other for purposes of the Sherman Act. Here, given that Tex-Shield is a wholly-owned subsidiary of Blucher, the Court will address the claims of alleged conspiracy only as they relate to the concerted conduct, if any, between Tex-Shield and Creative.

Despite its broad language, almost from its inception the Sherman Act has been read to prohibit only those restraints of trade that are unreasonable ("rule of reason"). Board of Trade v. United States, 246 U.S. 231 (1918). To state a claim under § 1, the plaintiffs must allege that 1) each of the defendants entered into an agreement ("contract, combination . . . or conspiracy"), and 2) that agreement was in "restraint of trade or [interstate] commerce." See

Appendix E

Monahan's Marine Inc. v. Boston Whaler, Inc., 866 F.2d 525, 526 (1st Cir. 1989). Using the rule of reason approach the Court finds that, even assuming that Tex-Shield sold its Saratoga Filter Cloth at a substantially lesser price than it had previously offered to sell to DJM, these agreements are not in restraint of trade for Sherman Act purposes. There is no indication in the complaint that the prices charged by Tex-Shield in these alleged discriminatory sales were predatory. Predatory pricing in simple terms means prices below average costs. See Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 231 (1st Cir. 1983) (defining "predatory" pricing as pricing below seller's costs, and discussing various cost tests; such pricing is predatory because it is a non-sustainable price that can drive competitors from the market and free the seller to raise prices well above competitive levels). It is well established that a dominant firm can lawfully charge a low, non-predatory price. Monahan's Marine, 866 F.2d at 527. As the Court stated in Monahan's, this holding is rooted in the concern that judicial efforts to prevent firms from charging low, non-predatory prices, despite an occasional beneficial result, would more often significantly interfere with the achievement of the Sherman Act's basic and important low price objectives. Id. The Court in Monahan's discussed the differences of price discrimination under the Robinson-Patman Act and the Sherman Act. It explained that even though Plaintiff could have established a violation under the Robinson-Patman Act had it met all the requirements, that fact does not establish a Sherman Act violation. Unlike the Sherman Act, which protects "competition, not competitors," Brown Shoe Co. v. United States, 370 U.S. 294, 320, (1962), the Robinson-Patman Act extends its

protection to competitors. It forbids sellers to "discriminate in price between different purchasers of commodities," where such "discrimination tends to "injure, destroy or prevent competition with any person who . . . receives the benefit of such discrimination." The word "with" makes a considerable practical difference. It means that the Act protects those who compete with a favored seller, not just the overall competitive process. Hence, in many circumstances, the Robinson-Patman Act forbids selective but non-predatory price cutting. Monahan's Marine, 866 F.2d at 529.

Like the Court in Monahan's, this Court finds nothing anti-competitive in the simple fact that a seller selectively cuts its prices, or offers other favorable terms, to some of its dealers, even though such conduct may have a competitive adverse impact on the non-favored dealers. For the foregoing reasons the claims, under section 1 of the Sherman Act and § 258 of the Puerto Rico Monopoly Act and for unlawful restraint of trade must be dismissed.

ii. Attempt to Monopolize Claim

DJM's claims under section 2 of the Sherman Act must also be dismissed inasmuch as DJM has failed to meet two indispensable prerequisites applicable to any plaintiff seeking relief for a violation of § 2 of the Sherman Act: the requirements of pleading antitrust injury and a relevant market. In addition, with respect to its conspiracy to monopolize claims, DJM has also failed to allege specific facts sufficient to aver a conspiracy.

Appendix E

A. Relevant Market

The Supreme Court has stated that "to establish monopolization or attempt to monopolize a part of trade or commerce under section 2 of the Sherman Act, it would . . . be necessary to appraise the exclusionary power of the (defendant's conduct) in terms of the relevant market for the product involved. Without a definition of that market there is no way to measure (defendant's) ability to lessen or destroy competition." Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, (1965). To establish a claim for the violation of § 2, however, a plaintiff must allege: (1) defendant's possession of monopoly power in a legally relevant market; and (2) the willful acquisition or maintenance of such power. See United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966). It is well established, however, that "a patent is an exception to the general rule against monopolies and to the right to access to a free and open market." Precision Instrument Mfg. Co. v. Automotive Maintenance Co., 324 U.S. 806, 816 (1945). Hence, Tex-Shield has "the right to exclude others from making, using or selling [its] invention throughout the United States." 35 U.S.C. § 154. Tex-Shield, however, cannot use its lawfully acquired monopoly power to foreclose competition in a non-patented relevant market. United States v. Griffith, 334 U.S. 100, 107 (1948). It is, therefore, necessary for the pleadings, as a threshold matter, to sketch a non-patented relevant market. See Gilbuilt Homes, Inc. v. Continental Homes of New England, 667 F.2d 209 (1st Cir. 1981). To assess the potential harm to competition from Tex-Shield's alleged misconduct in violation of § 2 of the Sherman Act the Court must first

make an inquiry into the relevant market. See Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459 (1993). A relevant market is composed of a relevant product market and a geographic market. Id. Thus, to withstand a motion to dismiss, DJM must allege that Tex-Shield possesses an illegally acquired monopoly power in some relevant geographic and product market.

1. The Relevant Product Market

DJM defines the relevant product market as the small business segment involving manufacture and sale of chemical protective clothing to the United States defense procurement agencies by companies eligible to be suppliers pursuant to the SBA Section 8(a) program. DJM maintains that the United States has restricted the procurement contracts objects of this action to participants of the SBA Section 8 (a) program. Therefore, by reason of the statutory regulations and requirements only certified SBA 8 (a) participants may take part of the bidding process in contracts set aside for small business and other manufacturers cannot and do not compete for this segment of business. DJM asserts that the SBA Section 8 (a) segment of the business of manufacture and sale of chemical protective clothing to the United States Military constitutes a separate line of commerce and relevant market for purposes of this action.

DJM argues that, as a result of patents for Saratoga Filter Cloth, associated know-how, and the preference of the United States Military for chemical protective clothing made from Saratoga Filter Cloth, defendants Blucher and Tex-Shield possess monopoly power in the United States trade

and commerce involving the manufacture, sale and distribution of chemical protective cloth for use in chemical protective clothing and equipage. This allegation, however, fails to set forth that Tex-Shield possesses an illegally acquired monopoly power over a non-patented relevant market inasmuch as Tex-Shield has a natural and legal monopoly over its patented product. See United States v. Aluminum Co. of America, 148 F. 2d 416, 423-26 (2d Cir. 1945). Hence, to survive dismissal, DJM must define relevant product market as the national patented and non-patented chemical protective cloth market. "In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purpose make up that 'part of the trade or commerce', monopolization of which may be illegal." See United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395 (1956).

DJM, however, fails to allege that the relevant product market is the chemical and biological protective cloth market. To the contrary, DJM intends to narrow the relevant product market to the Saratoga Filter Chemical Protective Cloth brand. In the Amended Complaint there is no mention of other chemical protective cloths in the market that compete with the Saratoga Filter Chemical Protective Cloth, or of other chemical protective cloths that should not be included in the relevant product market, or of other factors that make the Saratoga Filter Chemical Protective Cloth a unique market. See Mathias v. Daily News, L.P., 152 F.Supp. 2d 465,481-82 (S.D.N.Y. 2001). See also E.I.

du Pont de Nemours & Co., 351 U.S. at 393 ("[O]ne can theorize that we have monopolistic competition in every nonstandardized commodity with each manufacturer having power over the price and production of his own product. However, this power that, let us say, automobile or soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for the product.").

Here, DJM only avers that the Saratoga Filter Chemical Protective Cloth is a unique market inasmuch as it is the only brand of chemical protective cloth that the United States Military is willing to purchase. In sum, DJM alleges that Tex-Shield has monopolized the market for patented Tex-Shield chemical protective cloth which have no competitive or generic equivalent or alternate in the chemical protective cloth industry. Thus, DJM has failed to define a relevant product non-patented market inasmuch as Tex-Shield can use its lawfully acquired monopoly power to foreclose competition in the patented Saratoga Filter Chemical Protective Cloth market. See Aluminum Co. of America, 148 F. at 423-26.

2. The Relevant Geographic Market

DJM also fails to precisely define the relevant geographic market. DJM's only allegation that comes close to defining a geographic market is that Tex-Shield sold the Saratoga Filter Cloth to Creative outside of Puerto Rico, for less than the amount it was sold to DJM in Puerto Rico, and that Tex-Shield's conduct destroyed competition and

eliminated DJM as a competitor. DJM's description of Tex-Shield's operations, however, indicate a national market, for it alleges in its Amended Complaint that Tex-Shield has been designated the sole source by agencies of the United States Department of Defense for the cloth used in the Department's chemical and biological protective garments. DJM's "failure to define a geographic market with precision makes it impossible to assess the potential harm to competition resulting from [Tex-Shield's] alleged misconduct." See Mathias v. Daily News, L.P., 152 F. Supp.2d 465,483 (S.D.N.Y. 2001). Thus, DJM has failed to plead the two essential components of a relevant market.

B. Antitrust Injury

A plaintiff seeking to state a claim for violation of section 2 of the Sherman Act must allege that it has suffered an "antitrust injury." See Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344 (1990). To support its "antitrust injury", DJM avers that preferences were given by Tex-Shield to Creative by giving Creative more favorable credit and price terms; and by allowing Creative use of Tex-Shield's manufacturing facilities. Hence, DJM's allegations of injury amount to one basic proposition- - that DJM was injured by Tex-Shield's alleged business venture with Creative. DJM's allegations, however, do not constitute the type of "antitrust injury" necessary to state a claim for relief under section 2 of the Sherman Act.

To state an "antitrust injury" DJM must demonstrate "that the challenged action has had an actual adverse effect

on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice." Capital Imaging v. Mohawk Valley Med. Assoc., 996 F. 2d 537, 543 (2d Cir. 1993). "The antitrust laws . . . were enacted for 'the protection of competition, not competitors." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977).

Taking all well-pleaded facts in the Amended Complaint as true, the Court finds that Plaintiff has not pleaded enough minimal facts to establish an antitrust injury. DJM has alleged no facts on how the preferential price treatment to Creative or the use of joint manufacturing facilities between Creative and Tex-Shield has had an actual adverse effect on competition as a whole in the relevant market. Brunswick Corp., 429 U.S. at 488. DJM's loss of one contract is simply not enough to establish an antitrust injury to competition in the relevant market. In sum, DJM fails to adequately allege that anyone other than itself was injured.

C. Specific Facts to Aver a Conspiracy

DJM's pleadings on Tex-Shield's involvement with Creative, are also insufficient to establish a conspiracy between Creative and Tex-Shield to monopolize the relevant market. DJM has failed to identify how the conspiracy between Tex-Shield and Creative to manufacture and sell chemical protective clothing in the relevant market was formed, operated or maintained, and what specific overt acts, if any, were performed in furtherance of the conspiracy. See Day v. Fallon Community Health Plan, Inc., 917 F. Supp 72,

78 (D. Mass 1996); Mathias v. Daily News, L.P., 152 F. Supp.2d 465,484 (S.D.N.Y. 2001). True, the Supreme Court has stated that in antitrust cases "dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." Hospital Building Co. v. Trustees of Rex Hosp., 425 U.S. 738, 746 (1976). The Supreme Court, however, has also recognized that, "[i]t is not . . . proper to assume that the [plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged." Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 526 (1983). See also DM Research v. College of American Pathologists, 170 T.3d 33, 55 (1st Cir. 1999) ("[B]ald assertions as well as "subjective characterizations" need not be accepted and "[c]onclusory allegations," standing alone, "are a danger sign that the plaintiff is engaged in a fishing expedition."). The Amended Complaint does not plead sufficient facts to establish a conspiracy or an arrangement to thwart competition in the chemical protective clothing market to sustain a Sherman Act violation. Thus, DJM has not only failed to plead what was the relevant market and the antitrust injury, but has also failed to establish any factual bases for a conspiracy under Section 2 of the Sherman Act. Accordingly, DJM's attempt to monopolize claim must also be dismissed.

II. Statute of Limitations defense.

A. Parties' Allegations

Appendix E

The Blucher defendants argue that since the alleged wrongful actions by the defendants took place on June 22, 1994, DJM should have initiated this action by June 22, 1998 in order for the claims to be timely. Defendants maintain that since the complaint was not filed until September 16, 1998, it is time barred pursuant to the four-year statute of limitations for antitrust actions. Defendants assert that in antitrust law, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business and therefore a plaintiff has to file his claim within four years following the defendant's injurious act.

In its opposition, DJM argues that the limitations period may have been tolled for several months until DJM discovered that Tex-shield had quoted different prices for the Saratoga Filter Cloth. In support of its contention, DJM suggests that a cause of action does not accrue until a plaintiff has suffered damages as a result of the defendant's actions. Accordingly, it submits that DJM could not have suffered any damages until DPSC awarded the contract to Creative on September 22, 1994, and therefore the complaint filed on September 16, 1998 is timely.

Defendants also argue that, even if plaintiff's argument that the limitations period was tolled for several months were true, the claims would still be barred because of DJM's delay in serving the complaint. Defendants maintain that plaintiff's more than fifteen-month delay in service warrants summary dismissal for failure to prosecute. They argue that Plaintiff's lack of diligence also nullifies the

normal operation of Fed.R.Civ.P.3 by which the statute of limitations is tolled upon the filling of the complaint.

DJM opposes the service of complaint argument by stating that the complaint had to be served on Blucher GmbH in Germany under the complicated terms of the Hague Convention. Plaintiff maintains the Fed.R.Civ.P.4 specifically excludes a time limitation for the service of process in a foreign country, and therefore the 120-day limitation of Rule 4 (j) does not apply to the case at bar.

B. Legal Analysis

15 U.S.C. § 15b states:

> Any action to enforce any cause of action under section 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued.

The parties in the present case agree that the relevant conduct subject to the complaint took place no later than June 22, 1994. DJM acknowledges that the acts complained of occurred more than four years before it filed the complaint on September 16, 1998. However, DJM seeks to avoid the time bar on two legal theories, namely, (1) that the cause of action in connection with the DPSC procurement accrued on September 22, 1994 (the date DPSC awarded the contract to Creative rather than DJM) and not on June 22, 1994 (the date of Tex-Shield's quotation for the Saratoga Filter Cloth), therefore making the complaint timely; and (2)

fraudulent concealment on the part of the Blucher defendants.

An antitrust cause of action accrues and the limitations period commences each time a defendant commits an act that injures the plaintiff's business. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338 (1971). The Court in Zenith pointed out that in the context of a continuing antitrust conspiracy each time a plaintiff is injured by an act of the defendants, a cause of action accrues to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act. See Service Merchandise Co., Inc. v. Boyd Corp., 722 F.2d 945, 953 (1st Cir. 1983), citing Zenith Radio Corp., 401 U.S. at 338. For statute of limitations purposes, the focus is on the timing of the cause of the injury, i.e., the defendant's overt acts, as opposed to the effects of the overt acts. Peck v. General Motors Corp., 894 F.2d 844, 849 (6th Cir. 1990). Thus, the overt act of Tex-Shield's quotation for the Saratoga Filter Chemical Protective Cloth fixed the date of accrual of the statute of limitations.

DJM also argues a fraudulent concealment on the part of defendants. To invoke the doctrine of fraudulent concealment, a plaintiff must plead and (later) prove three elements: (1) wrongful concealment of the relevant conduct by the defendant; (2) failure of the plaintiff to discover the operative facts that are the basis of his cause of action within the limitations period; and (3) plaintiff's due diligence until discovery of the facts. Berkson v. Del Monte Corp., 743

F.2d 53, 55 (1st Cir. 1984). The burden rests squarely on the party pleading fraudulent concealment. Id.

To avoid the bar limitation through invocation of the concept of fraudulent concealment, the plaintiff must allege facts showing affirmative conduct on the part of the defendant which would, under the circumstances of the case, lead a reasonable person to believe that he did not have a claim for relief. Silence or passive conduct of the defendant is not deemed fraudulent, unless the relationship of the parties imposes a duty upon the defendant to make disclosure. Rutledge v. Boston Woven Hose & Rubber Co., 576 F.2d 248, 250 (9th Cir. 1978), cited in Berkson, 743 F.2d at 56. Here, DJM must plead sufficient facts showing that it exercised due diligence in discovering the defendants' alleged price-fixing conspiracy and that it reasonably relied on the defendants' affirmative acts of concealment. See In re Compact Disc Minimum Advertised Price Antitrust Litigation, 138 F.Supp. 2d 25 (D. Me 2001), citing Berkson, 576 F.2d at 250.

The record shows that as early as 1994, DJM had knowledge that Tex-Shield had offered lower, allegedly discriminatory prices, to Creative. Furthermore, On July 16, 1997, still within the limitations period, DJM initiated Civil No. 97-1457 against Tex-Shield, for the same series of events leading to the complaint filed against the Blucher defendants in Civil No. 98-2065 (both cases are now consolidated). If DJM wished to bring an action based on its suspicions, it was under a duty to exercise due diligence in investigating whether the suspicions were well founded. See Berkson, 743 F.2d at 56. There is no indication in the record

of any efforts by DJM to substantiate its fraudulent concealment claim. Conclusory allegations will not suffice to establish a claim of fraudulent concealment. Without any allegations of due diligence, the plaintiff cannot claim that its claims were fraudulently concealed. Id. at 56.

In light of the foregoing, the Court finds that the statute of limitations expired on June 22, 1998, four years after Tex-Shield's alleged discriminatory quotation. Hence, DJM's claims against the Blucher defendants (Blucher GmbH and Blucher USA) and Creative are time barred under the four-year statute of limitations applicable to antitrust actions. Plaintiff has also failed to successfully assert fraudulent concealment to avoid the limitations bar.

In view of our conclusion on the running of the statute of limitations, we need not address Blucher's argument that the fifteen-month delay by DSM in service warrants dismissal for lack of due diligence. We will now address the remaining claims against Tex-Shield under the Robinson-Patman Act as well as the state law claims based on price discrimination.

III. Price Discrimination

A. Parties' Allegations

Defendants have moved for dismissal on the grounds that the claim cannot go forward because Plaintiff failed to establish the threshold requirements of (1) two contemporaneous sales, and (2) harm to competition. Defendants argue that a difference in price between a sale to

one person and an offer to another does not constitute "price discrimination" under Robinson-Patman § 2(a) nor under § 263 of the Puerto Rico Antimonopoly Act. According to the defendants, a sale at one price and a mere offer to sell at another price is insufficient to show a Robinson-Patman violation. Defendants maintain that this is a case in which defendant, Tex-Shield made an offer to DJM and a sale to Creative for the DPSC contract and therefore the two or more sales requirement was not met.

Defendants also argue that DJM failed to establish that the alleged price discrimination tended to harm competition as required under the Robinson-Patman Act and under § 263 of the Puerto Rico Antimonopoly Act. They argue that the complaint alleges only one instance of Tex-Shield selling chemical protective cloth at lower prices to a competitor, namely, the sale to Creative under the DPSC contract. Moreover, Defendants maintain that the complaint does not allege any competitive injury supported by factual allegations. They argue that the complaint is premised on the injury to the plaintiff, not to competition, which is not the type of injury that the antitrust laws are meant to prevent.

In opposition to defendants' motion to dismiss, DJM, argues that paragraphs 22 and 23 of the Amended Complaint in Civil No. 97-1457 and paragraphs 44 and 45 of the Complaint in Civil No. 98-2065, allege a series of discriminatory sales of Saratoga Filter Cloth outside of Puerto Rico at a substantially lesser price than those prices offered and sold in Puerto Rico, during the period of July 1993 through April 1997. DJM asserts that the difference in price was in the range of $11 to $13 per chemical suit, after

making due allowance for differences in costs incident to the delivery of goods in Puerto Rico, the costs of handling such goods in Puerto Rico, and the costs of the basic cloth, coupled with a $2.3 million prepayment.

Defendants further argue that DJM's claim under § 264 of the Puerto Rico Antimonopoly Act also fails because no intent to destroy a competitor can be inferred, inasmuch as Tex-Shield was ineligible to compete with DJM for Section 8(a) contracts, and because the prices quoted to DJM and Creative under the DPSC solicitation were not for goods of the same grade or quality. Defendants argue that Tex-Shield is a cloth-supplier to manufacturers such as DJM; when Tex-Shield provided DJM with a price quote alleged to be unfairly high, Tex-Shield was not acting with the purpose of eliminating one of its competitors or destroying its competition.

DJM claims that a careful reading of § 264 reveals the statute applies to offers as well as sales (no two-sales requirement), when the purpose is to destroy competition or destroy a competitor. DJM also claims that Tex-Shield and Creative were acting in collusion to eliminate competition in the market of Section 8 (a) contracts.

B. Legal Analysis

In general, Section 2 (a) of the Robinson-Patman Act prohibits discrimination in price between purchasers of goods of like grade and quality, where the effect may be to

substantially lessen competition or to tend to create a monopoly.

The Puerto Rico price discrimination statute, which is almost identical to Section 2 (a) of the Clayton Act, also makes it "unlawful for any person either directly or indirectly to discriminate in price between purchasers . . . in Puerto Rico . . ." 10 L.P.R.A. § 263.

To establish a prima facie case of price discrimination under § 2 (a), Plaintiff must plead: "(1) two or more contemporaneous sales by the same seller; (2) at different prices; (3) of commodities of similar grade and quality; (4) at least one of the sales was in interstate commerce; (5) price discrimination tended to lessen substantially competition or create a monopoly in any line of commerce; and (6) this price discrimination injured plaintiff." Walpa Constr. Corp. v. Mobile Paint Mfg. Co., 701 F.Supp. 23, 27 (D.P.R. 1988). DJM's complaint fails to allege several of these elements.

In support of its §2 (a) claim, DJM points out to a series of discriminatory sales, during the period of July 1993 through April 1997, in which defendants allegedly offered and sold the same Blucher GmbH technology, outside of Puerto Rico, for a substantially lesser price. However, DJM mainly relies on the sales of Saratoga Filter Cloth by Tex-Shield under the Air Force and DPSC procurements to establish the elements of its price discrimination claim.

Although this Court is bound to accept well-pleaded factual allegations as true, it certainly has difficulty in

ascertaining the factual bases of the allegations in this case. Day v. Fallon Community Health Plan, Inc., 917 F.Supp. 72, 75 (D. Mass. 1996). Despite references to a series of sales in the complaint, plaintiff offers no insight into the specific nature of the alleged discriminatory sales. Even though DJM pleads that Tex-Shield made a series of sales to unspecified parties at prices lower than those charged to it, there is no indication within the complaint as to the contemporaneity of the alleged sales or to the overall conditions surrounding them. DJM does not indicate whether the parties involved in the alleged series of sales within this four-year period were competing purchasers or whether they participated in the § 8 (a) submarket or whether these sales had any detrimental effect on competition. Since Plaintiff relies mainly on the sales related to the Air Force and DPSC contracts, however, we shall turn to those sales to determine whether they suffice to establish a prima facie case for price discrimination.

Although it is not entirely clear from the consolidated complaints and the motions submitted to the Court, it appears that the procurements involved in this action were separated by almost one year. The Air Force and DPSC solicitations were issued on or about July 1993 and June 1994, respectively.

The motions to dismiss presented to the Court are based on defendants' argument that as result of the arbitral award denying DJM's claims related to the Air Force contract, they should not to be considered for purposes of DJM's price discrimination claim. Accordingly, defendants insist on the absence of the two contemporaneous sales

required by the statute. Defendants mainly rely on Terry's Floor Fashions, Inc. v. Burlington Indus., Inc., 568 F.Supp. 205 (E.D.N.C. 1983). In that case the Court decided that at least two sales must take place in order to constitute discrimination and that a sale at one price and a mere offer to sell at another price is insufficient to show a Robinson-Patman Act violation. We are not convinced, however, by defendants' assertion that in the present case there was only one sale and a mere offer to sell. DJM clearly points to the existence of two completed transactions. The sale to DJM regarding the Air Force contract, even though determined not to be discriminatory by the arbitral award, could be considered as a completed transaction for purposes of future sales such as the one made to Creative regarding the DPSC contract. As the Supreme Court has stated, "no single sale can violate the Robinson-Patman Act. At least two transactions must take place in order to constitute discrimination. Thus, a contract may be made today which has no legal defect under the Robinson-Patman Act. A week later, another sale may be made at a different price or at a different discount, and the latter taken into consideration with the former may establish a discrimination.... It is plain that the violation, if there was one, is not inherent to the contract sued upon..." Bruce's Juices v. American Can Co., 330 U.S. 743, 755 (1947).

The mere existence of two completed sales at different prices, however, will not by itself establish a Robinson-Patman violation. In order to prevail on its Robinson-Patman Act claim, plaintiff must demonstrate the existence of two completed comparable sales. Since discrimination can arise only from pricing disparities in

reasonable comparable transactions under similar circumstances, the prohibition of the statute will not be triggered if the pertinent sales are too far apart. F. Rowe, Price Discrimination Under the Robinson-Patman Act, § 4.2, p. 48, citing Chicago Sugar Co. v. American Sugar Refining Co., 176 F.2d 1, 8 (7th Cir. 1949). Also, the evil at which the Robinson-Patman Act is aimed is discrimination between different competing purchasers, where the effect of such discrimination may be substantially to lessen competition or to tend toward a monopoly in commerce. For that evil to exist there must be, of course, at least two different competing purchasers. Here, the sales to DJM and Creative occurred almost a year from each other and, furthermore, as admitted by DJM, Creative was a competitor of DJM during that time period because it had not obtained its § 8 (a) certification and therefore could not compete in the bidding for the Air Force procurement.

Even though DJM points to two completed sales, these were not the "comparable transactions under similar circumstances" required by the statute to constitute a Robinson-Patman violation. In light of the foregoing the claims under § 2 of the Clayton Act as amended by the Robinson-Patman Act and § 263 of the Puerto Rico Antimonopoly Act must be dismissed.

DJM makes separate allegations of unlawful price discrimination under 10 L.P.R.A. § 264, claiming that defendants sold, offered to sell and participated in steps for the sale of Saratoga Filter Cloth outside Puerto Rico at prices substantially different from the prices offered in Puerto Rico,

with the purpose of destroying competition or eliminating a competitor.

Even though DJM construes this statute as a price discrimination provision, it is really meant to be a state anti-dumping provision, similar to the Federal Anti-Dumping Act of 1916, prohibiting the sale of articles in Puerto Rico at prices that are less than their market value in their domestic market, with the purpose of injuring or destroying competition in Puerto Rico. Arturo Estrella, Antitrust Law in Puerto Rico. 28 Rev. Col. Abog. 505, 624-626 (1968). The phrase "substantially different" in relation to price was used with the intention of outlawing lower prices. Id., quoting Diario de Sesiones, Vol. XVIII, at 1708.[12]

The Anti-Dumping Act of 1916[13], part of the Revenue Act of the same year, is directed at sales of articles imported into the United States and sold at a substantially lesser price than the market value of such articles at the time of exportation in the principal markets of the country of production. United States v. Cooper Corp., 312 U.S. 600, 609 (1941). Dumping has been defined as the selling of a product below either (a) the cost of production and delivery; or (b) the price for which a foreign product is sold in its own market. Wheeling-Pittsburgh Steel Corp. v. Mitsui & Co., 26 F.Supp.2d 1022, 1023 (S.D. Ohio 1998).

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[12] The Senate Report states:

This provision punishes dumping (flooding the market with merchandise from outside at prices substantially lower that the market price) with the purpose of destroying competition or eliminating a competitor in Puerto Rico.

[13] 15 U.S.C. § 72.

Appendix E

Here, DJM makes no allegation regarding the sale of Saratoga Filter Cloth at prices substantially lower that those offered in the United States. DJM simply urges a construction of the statute as one of price discrimination. We are not convinced by DJM's argument. It is clear that § 264 of the Puerto Rico Antimonopoly Act addresses the practice of flooding the Puerto Rican market with merchandise from foreign markets by offering such products at prices substantially lower that those offered in the products' domestic market, with the purpose of destroying competition or eliminating a competitor. There are no allegations to that effect in DJM's Complaint. Accordingly, the claim for price discrimination under 10 L.P.R.A. § 264 must also be dismissed.

IV. Bid Rigging

A. Parties' allegations

Finally, defendants argue that under the theory of bid rigging set forth in the complaint, DJM has failed to state a cause under federal antitrust law. Defendants maintain that DJM's bid rigging claim is not supported by any antitrust legislation or case law. To the contrary they contend that bid rigging under the statute requires a horizontal agreement (between competitors) designed to permit competitors to share contracts and fix prices.

Defendants maintain that Creative, the alleged partner in the bid rigging scheme, is a customer and not a competitor of Tex-Shield. Accordingly, defendants assert

that because Tex-Shield and Creative did not bid against each other, DJM's bid rigging claim is a hollow accusation having no legal support. Defendants also assert that DJM's allegation that Tex-Shield conspired with Blucher to engage in bid rigging fails to state a claim because Tex-Shield is Blucher's wholly-owned subsidiary.

B. Legal Analysis

Plaintiff has advanced a claim for bid rigging alleging that Tex-Shield combined with Creative to rig the bidding process in § 8 (a) procurement contracts. Bid rigging is one of the antitrust violations that "because of its pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958). United States v. Mobile Materials, Inc., 881 F.2d 866, 869 (10th Cir. 1989), cert. denied, 493 U.S. 1043 (1990). See U.S. v. Reicher, 983 F.2d 168, 170 (10th Cir. 1992).

Bid rigging is a very specific type of horizontal violation of section 1 of the Sherman Act defined as: "Any agreement between competitors pursuant to which contract offers are to be submitted to or withheld from a third party. . . ." See United States v. Portsmouth Paving Corp., 694 F.2d 312, 325 (4th Cir. 1982)). See also United States v. David E. Thompson, Inc., 621 F.2d 1147, 1149-50 (1st Cir. 1980). Bid-rigging in violation of § 1 contemplates only agreements between actual or potential competitors. United States v. Portsmouth Paving Corp., 694 F.2d 312, 325 (4th Cir. 1982);

Appendix E

United States v. W.F. Brinkley & Son Constr. Co., 783 F.2d 1157, 1160 (4th Cir. 1986); United States v. Ashland-Warren, 537 F.Supp. 433, 445 (M.D. Tenn. 1982) (finding that bid –rigging schemes are useless unless the offending group consists of competitors) (criminal prosecution). Stated another way, "courts have only deemed bid rigging a per se violation where the agreements have been horizontal." MHB Distributors, Inc. v. Parker Hannifin Corp., 800 F. Supp. 1265, 1268 (E.D.Pa. 1992); Advanced Power Systems v. Hi-Tech Systems, 801 F. Supp. 1450, 1463 (E.D.Pa. 1992); see Business Electronics v. Sharp Electronics, 485 U.S. 717, 730, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988) (finding that competitor-imposed restraints are horizontal, while restraints imposed by agreement between firms at different levels of distribution are vertical). See Zachair, Ltd. v. Driggs, 965 F. Supp. 741, 747 (D. Md. 1997).

Here, Plaintiff has failed to establish any facts that would tend to show directly or support the inference that Tex-Shield is an actual or potential competitor of DJM in the relevant market. The record clearly shows that Creative is a Customer of Tex-Shield and neither Creative nor Tex-Shield bid against each other for § 8 (a) procurement contracts. There is no evidence of a horizontal relationship between these two entities. In view of our finding that there is no horizontal relationship between Creative and Tex-Shield, the Court concludes that there could be no bid rigging agreements of the type prohibited by the Sherman Act. Accordingly the claims for bid rigging must be dismissed.

Appendix E

CONCLUSION

For the foregoing reasons Defendant's Motions to Dismiss (Docket No. 77 and 96) are **GRANTED**. DJM's Motion for Entry of Partial Summary Judgment (Docket Nos. 104, 108 and 115) is now **MOOT**.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 28th day of June, 2002.

/s/ Jay A. Garcia-Gregory
JAY A. GERCIA-GREGORY
UNITED STATES DISTRICT JUDGE

Appendix F – Award Of Arbitrator, dated January 20, 1999 in DJ Manufacturing Corporation v. Tex-Shield, Inc., American Arbitration Association, No. 13 130 00470 98

AMERICAN ARBITRATION ASSOCIATION
Arbitration Tribunal

In the Matter of Arbitration between

Re: 13 130 00470 98
DJ MANUFACTURING CORPORATION
TEX-SHIELD, INC.

AWARD OF ARBITRATOR

I, THEE UNDERSIGNED ARBITRATOR, having been designated in accordance with the Arbitration Agreement entered into between the above-named Parties and dated January 21, 1994, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, do hereby, FIND, as follows:

1. CLAIMANT'S claim for, relief under the Robinson-Patman Act (Statement of Claim #21) was withdrawn during the hearing (See Transcript October 29, 1998, at 288) and is therefore dismissed.

2. CLAIMANT'S claim for relief under 264 of the Laws of Puerto Rico was not withdrawn but is denied because the evidence did not establish that a "discrimination" in quotes actually occurred or that, even if any difference in quotes did occur, it was with respect to

"goods of like grade or quality" as the wording of the statute requires. In addition, even assuming that CLAIMANT could be deemed a "competitor" within the meaning of the statute, the evidence does not support a finding that the difference in quotes was the proximate cause of the damages claimed.

This is not a case where CLAIMANT was disadvantaged in obtaining the contract by virtue of a difference in the terms quoted to RESPONDENT compared to more favorable terms offered to a winning bidder. Rather, CLAIMANT'S contention, and the basis for all it's antitrust damages claims, is that it was damaged by RESPONDENT'S alleged failures to act in good faith, animus toward CLAIMANT, and abuse of its unique position after CLAIMANT obtained the contract.

3. CLAIMANT'S tie-in claim under Section One of the Sherman Act is denied for several reasons, including lack of evidence that CLAIMANT was in fact coerced by RESPONDENT to agree to the alleged tied product (the allegedly unneeded and unwanted technical services contract) in order to obtain the tying product (continued performance under the subcontract). Contemporaneous evidence showed the CLAIMANT conceded that some technical support beyond that reasonably required by the subcontract was needed at some price (see CLAIMANT'S own Exhibits C-41 and C-S4); the objection that services (other than cutting, sewing and packaging end items and assistance with CDRLS) were completely unnecessary and solely exploitative appears never to have been articulated until this arbitration began would be enforceable or whether CLAIMANT would be entitled to recovery if

CLAIMANT had in fact paid more than the reasonable value of necessary additional services.

4. CLAIMANT'S breach of contract claim based on delay is denied based on the weight of the evidence as well as section 13 of the subcontract. As to some aspects of performance under both the original subcontract and technical services agreement, however, I find that breaches of the implied covenants of good faith and good dealing under New Jersey law have been established.

Those breaches do not operate to provide CLAIMANT with an affirmative recovery but as a partial defense, estoppel, and limitation and set-off as to some amounts it would otherwise owe on the subcontract and technical services contract. Therefore, I deny CLAIMANT *any* monetary relief on this claim.

5. With respect to RESPONDRNT'S first and third counterclaims for breach and non-payment under both the subcontract and technical services contract, I award RESPONDRNT a total net recovery, after all limitations and set-offs referred to in paragraphs 3 and 4, of FIVE HUNDRED EIGHTY THREE THOUSAND FOUR HUNDRED SIXTEEN DOLLARS ($583,415) on all claims inclusive of all interest and finance charges up to and including the date of this award.

6. Finding that there were reasonable grounds other than the duress argument for CLAIMANT'S proceeding initially in United States District Court in Puerto Rico rather than in arbitration, and for contesting the applicability and enforceability of the arbitration clause over the claims sought

to be asserted, I deny all relief on RESPONDENT'S second counterclaim for breach of the arbitration clause.

7. The compensation of the Arbitrator totaling SIXTEEN THOUSAND DOLLARS *($15,000.00)*, shall be borne equally by the Parties. Therefore, RESPONDENT shall pay to the American Arbitration Association the sum of SEVEN HUNDRED TWENTY FIVE DOLLARS *($725.00)*, representing that portion of said compensation still due the Association.

8. The administrative fees and expenses of the American Arbitration Association totaling EIGHTEEN THOUSAND FOUR HUNDRED THIRTY FIVE DOLLARS AND SIXTY CENTS *($18,435.50)*, shall be borne equally *by* the Parties. Therefore, CLAIMANT shall pay to the American Arbitration Association the sum of NINE DOLLARS AND NINETY SEVEN CENTS ($9.97), representing its respective balance of said fees and expenses still due the Association, and RESPONDENT shall pay to the American Arbitration Association FIVE HUNDRED SIXTY DOLLARS ($560.00), representing its respective balance of said fees and expenses still due the Association.

(Tr.269-71). Moreover, the testimony and Exhibit C-41 itself reflect that CLAIMANT believed that willingly accepting the technical services contract (to the extent that the price was regarded as over-stated) would help it obtain a favorable price quotation for a completely different contract, a "tie-in" that apparently proved illusory but in any event has nothing to do with the tie-in alleged in this case (See Tr.269-71,1145-

50).

The tie-in claim also raises the interesting question whether there can be any illegal tie without foreclosure of competition in the tried product market. There is contradictory language on this point in the Supreme Court's Jefferson Parish opinion. Compare Jefferson Parish Hospital Dist. No.3 v. Hyde. 466 U.S. 2,12(1984) (describing elements of coercion) with id. at 16 (no effect on competition when purchaser is forced to buy a completely unwanted product). The weight of the evidence here was that Claimant allegedly felt itself forced to purchase what it considered largely unnecessary or over-priced services rather than that it was foreclosed from obtaining those services; indeed, it was clear from the testimony that most of the services depended on knowledge and information about the patented process licensed to RESPONDENT and known only to RESPONDENT and its parent and that CLAIMANT made no attempt and felt no need to obtain those services from a third party. There was thus no foreclosure of potential competition in the tied product market, the principal evil against which the prohibition of tie-in sales is directed as evidenced *by* its juxtaposition with exclusive dealing provisions in Section 3 of the Clayton Act.

Although not articulated precisely in this way, the claim might nevertheless be actionable under per se rule on

the theory that it allows one with market power to evade circumstances which would otherwise limit its use of market power to exact an inflated price. The classic case would be a monopolist who avoids price regulation by deriving revenues from an unregulated product or service tied to a price controlled regulation or service; here, the constraint might be the original subcontract price which RESPONDENT needed to negotiate in order to have CLAIMANT obtain the government contract and allegedly lock CLAIMANT in to the subcontractor-contractor relationship.

Ultimately, however, I do not need to resolve this issue because, as noted above, the weight of the evidence convinces me that RESPONDENT did realize a need to have available some additional technical services from RESPONDENT beyond those RESPONDENT could reasonably have been expected to have provided gratis under the original subcontract. I also find from the weight of all the evidence that CLAI~ did receive some such services, and that the reasonable value of such services, though less than the technical services contract required in payment, exceeded any amounts CLAIM can be deemed ever to have paid under the technical services agreement. Therefore, in addition to finding an absence of coercion, I do not believe that CLAIMANT has in fact been damaged *by* the alleged tie-in and dismiss this claim. Because I believe that RESPONDENT did breach its duty of good faith and fair dealing under both the original subcontract and technical services agreement, as stated in paragraph 4, I have limited its recovery to what the evidence convinces me is the reasonable value of RESPONDENT'S services under the technical services agreement. I therefore need not reach the

question whether the agreement.

9. This Award is in full settlement of all claims and counterclaims submitted to this Arbitration.

"/s James B. Kobak, Jr." 1/20/99
James B. Kobak, Jr., Esq./ DATED

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

I, James B. Kobak, Jr., Esq., do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.

1/20/99 "/s James B. Kobak"

Appendix G – The Anti-Monopoly Act of 1964: February 20, 1964 Hearing on S. 594 & H. 909 before Senate Civil Juridical Committee, House Committee on Commerce & Industries & House Committee; Testimony of Hiram Cancio (Certified English translation, from Appellee's Appendix submitted to the Court of Appeals, pages 26-27)

MR. REYES DELGADO: Or when it is manufactured. Would this include situations in which goods are manufactured in Puerto Rico and exported to Mexico at a price that is lower than the price in Puerto Rico?

MR. CANCIO: Higher.

MR. REYES DELGADO: No, lower.

MR. CANCIO: I don't believe it would apply to such a situation.

MR. REYES DELGADO: You believe it would not?

MR. CANCIO: Specifically this provision which you are analyzing applies when, for example, a person produces goods in New York. And there, in New York, he sells the product at x dollars, but then, in Puerto Rico, there are others who are selling that same product and he has to sell, it, let's say, also at x dollars if he can produce it here cheaply or at x plus two or three. He who sells in New York at x dollars presumably sells it in Puerto Rico more expensively, because of transportation, etc.; comes to Puerto Rico and sells it more cheaply and then enters into unfair competition with those others.

Appendix G

MR. REYES DELGADO: Yes, in that case. But suppose a manufacturer manufactures the goods in Puerto Rico exports them to Mexico and sells them there for a dollar and in

Puerto Rico sells them at a dollar fifty.

MR. CANCIO: Well I believe the statute does not contemplate that problem, and it's more of a concern for Mexico than for Puerto Rico.

MR. REYES DELGADO: No, no. Why, why should we allow our people to be exploited in such a fashion, while the people in Mexico are not. Goods manufactured by the hands of our work force, transported to Mexico which entails some expense, and then selling in Mexico at a lower price than here.

MR. CANCIO: No, that is not covered by the statute. I believe, subject to answering more clearly on a future occasion, that the statute does not contemplate that situation, directly, just merely, because one is selling more cheaply or more expensively. What does happen is that if he, for example, in selling at a cheaper price in Puerto Rico, is engaging in a monopolistic practice, we could always prosecute him.

MR. REYES DELGADO: No, if he sells more cheaply in Puerto Rico all the better. Our people benefit from that.

MR. CANCIO: Well, if he sells it more cheaply unless it is done in such a fashion so as to constitute unfair competition.

MR. REYES DELGADO: Correct, correct. However, in my

Appendix G

opinion means should be found in order to deal with the situation where local production is sold in Puerto Rico at a higher price than outside Puerto Rico, for example in Mexico, without any justification. The same thing would have been made in Puerto Rico.

MR. CANCIO: As I said, I believe this bill does not provide for such cases. The fact is that we have not seen that as a problem occurring to the detriment of Puerto Rico. . . ...

United States District Court
For the District of Puerto Rico

- CERTIFIED -

To be a correct translation made
and/or submitted by the interested party

"s/ (signature unreadable)"
Certified Court Interpreter
Administrative Office of the
United States Courts